S. HRG. 103–1086

# THE CONSTITUTIONAL RIGHT TO INTERNATIONAL TRAVEL



BEFORE THE

## SUBCOMMITTEE ON THE CONSTITUTION

OF THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

THE CONSTITUTIONAL RIGHT TO INTERNATIONAL TRAVEL, FOCUSING ON UNITED STATES RESTRICTIONS ON TRAVEL TO CUBA

OCTOBER 5, 1994

**Serial No. J–103–75**

Printed for the use of the Committee on the Judiciary



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# THE CONSTITUTIONAL RIGHT TO INTERNATIONAL TRAVEL

**WEDNESDAY, OCTOBER 5, 1994**

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2:03 p.m., in room 628, Dirksen Senate Office Building, Hon. Paul Simon (chairman of the subcommittee), presiding.

## OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. The hearing will come to order.

We are holding a hearing on the whole question of the right of American citizens to travel. Generally, that has been regarded as a fifth amendment matter. The court decisions over the years have varied somewhat. There is a question of how much power the executive branch has, and we will hear from a distinguished House colleague who has been a leader in this area.

I think there is not only a fifth amendment factor here, I think there are two other constitutional amendments that are involved. One is a first amendment question, and that is free speech. In fact, if we are to have a good cross-section of speech and ideas and opinions, to restrict travel, whether it is to Cuba or Iran or Iraq or any other place other than for two reasons I will mention shortly, would limit our ability to have an insight into what is taking place in those countries. I think this is a free speech issue.

Second, perhaps the most significant and too frequently noted amendment to the Constitution is the ninth amendment. It was written when James Madison sent out his prospective list of a Bill of Rights, and Alexander Hamilton said, if you spell out these rights, then there will be people who will say, these are the only rights that people have.

So the ninth amendment was added to the Bill of Rights and the ninth amendment says that, other rights not spelled out here are reserved to the people. I believe that also applies to travel.

I believe there are only two reasons when the Federal Government can restrict the right of travel. One is if there is a genuine national security concern, and those instances are rare. I don't think there is a national security factor, for example, at work in the case of Cuba.

The second is the safety of Americans. The Federal Government does have the responsibility to try to protect American citizens, and

if an American citizen were to go into an area of great danger, the government has the right to protect our safety.

I would like to quote from two distinguished justices, Justice Arthur Goldberg, who practiced law in Illinois for a longtime, and if I may add, was a partner of the new counsel to the President. Arthur Goldberg wrote in a 1965 opinion and quoted President Dwight Eisenhower. Here is what Dwight Eisenhower said, quoted by Justice Goldberg. "Any limitation on the right to travel can only be tolerated in terms of overriding requirements of our national security and must be subject to substantive and procedural guarantees." I think Dwight Eisenhower was correct.

Then in a more recent case, Justice William Brennan in a dissent, I regret to say, said, "Just as the Constitution protects both popular and unpopular speech, it likewise protects both popular and unpopular travelers, and it is important to remember that this decision applies to other citizens who may merely disagree with government foreign policy and express their views."

My belief is that Justice Brennan is correct, but we are here to see where we should go, what we should do, and I am ready to reexamine my views.

I would like to insert into the record a statement from Senator Orrin G. Hatch of Utah, who was unable to be here today.

[The prepared statement of Senator Orrin G. Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, the "right to travel abroad" is a liberty belonging to all Americans as a natural right to be free from arbitrary government restraint. That right preexists the formation of our Constitution and, in Anglo-American law, was perhaps first codified in Article 42 of the Magna Carta. It was also recognized as an important precept of the "law of nations" and written about by the great natural law scholars Hugo Grotius in the 17th Century and Emil de Vattel in the 18th Century.

These scholars' teachings on natural law had a profound impact on the Founders of the American Republic. In American constitutional jurisprudence, it was Justice Douglas who-first argued in *Kent* v. *Dulles* that the right was a constitutional right: "The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."

Yet the right to travel abroad is not an unbounded right. Thus, in Magna Carta the right may be curtailed "in time of war, for some short space, [and] for the common good of the kingdom * * * according to the laws of the land * * *." These national security and public good considerations have been acknowledged through American customary practice and by case law as legitimate grounds to restrict unfettered travel abroad.

Thus, the Secretary of State as an agent of the President, acting through the authority to deny passports pursuant to statutes and presidential proclamations, has restricted travel during the War of 1812, the Civil War, the First World War, and during other wars and national emergencies.

Congress pursuant to both the "Trading with the Enemy Act" and the "International Emergency Economic Powers Act" explicitly delegated to the President the authority to restrict or even prohibit foreign travel during times of war or national emergencies declared by the President. Moreover, the U.S. Supreme Court, in *Zemel* v. *Rusk* and *Haig* v. *Agee,* recognized that the President acting pursuant to statute could restrict foreign travel, consistent with the Constitution, for national security or foreign policy reasons.

The lesson of history, therefore, has been that the right to travel abroad must be carefully balanced against the national interest, the "common good" as termed by the Magna Carta. It appears that Section 525 of the most recent Foreign Relations Authorization Act, the "Free Trade in Ideas Act," amends existing statutory law to restrict the President's authority to restrain or prohibit travel during periods of national emergencies. This raises two questions that will be addressed during this hearing.

One, is it wise? History has demonstrated that the Executive should have the authority to restrict foreign travel, albeit an authority that must be carefully balanced against the right to travel and other rights, such as First Amendment Free Speech. Thus, the President may not prohibit travel simply because he disagrees with the politics or views of an individual. But the President ought to be able to restrict travel if American citizens would be placed in harm's way, possibly taken hostage, or where travel to an unfriendly anti-American or enemy foreign nation would aid that nation.

Second, is it constitutional? Does our Constitution delegate to the President inherent or implied authority to restrict foreign travel for the common good as part of the executive prerogative to conduct foreign affairs? Many of the Founding generation, including Alexander Hamilton and John Marshall, believed that the Constitution vested in the President the sole authority to conduct foreign affairs, and surely an implied power from that constitutional delegation of power is the ability to restrict foreign-travel during emergencies or for national security reasons.

In fact, Justice Nelson, sitting as a Circuit judge in the 1860 case of *Durand* v. *Hollins,* held that not only does the President as the executive head of this nation possess a foreign affairs prerogative, but that the President has a constitutional duty to protect American lives and property abroad from harm. Although the court did not reach the travel issue, its holding supports an inherent presidential power to restrict travel during bona fide emergencies.

Indeed, this Subcommittee's predecessor in 1957 held a hearing on the issuance of passports, as it related to the right to travel abroad, in which it was widely recognized that the Executive has an inherent and historic power to deny the issuance of passports for national security reasons.

I want to welcome our esteemed witnesses to what promises to be an enlightening hearing, particularly in regard to how these issues impact the present policy on restricted travel to Cuba.

Senator SIMON. The first person who is going to force me to reexamine those views is a distinguished former colleague of mine in the House who now provides leadership on many issues, including particularly the whole area of immigration. Howard Berman has just done a superb job over in the House. Congressman Howard Berman.

## STATEMENT OF THE HON. HOWARD L. BERMAN, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative BERMAN. Thank you very much, Mr. Chairman. If anything I say forces you to reconsider your views, it is because I have said it very badly, because my own thoughts very much follow what you just announced.

I have a longer statement for the record, which I would like to have included.

Senator SIMON. We will enter it into the record.

Representative BERMAN. It is obviously apparent from a number of efforts that I have made over several Congresses to have the Free Trade in Ideas Act enacted, that I consider the right to travel and communicate with citizens of other countries among the most significant issues in our foreign policy.

Let me say at the outset that I strongly believe that the law should provide the power to government under certain circumstances to regulate and restrict economic relations with countries, particularly in times of war. I also believe strongly that the use of such power can be a very significant instrument of diplomacy.

And finally, I believe that the decision on which particular countries these powers should be used against and of the particular measures to be employed are, in most cases, most effectively made

as executive decisions within legislative guidelines provided by Congress.

It is for these reasons that I concur in the Congressional judgment to delegate its constitutional authority over international commerce to the President in the Trading With the Enemy Act, (TWEA) and the International Emergency Economic Powers Act, (IEEPA).

That said, I believe that these economic powers must be exercised in a manner which does not infringe on the constitutional rights of Americans, or just as important, does not run counter to other equally-compelling foreign policy interests.

You will hear today erudite arguments about the constitutional protection which travel and related activities should enjoy. I will, therefore, not enter into that except to say that I am persuaded that the right to travel is constitutionally protected and that it is closely related to the first amendment right of Americans to communicate and share ideas with citizens of other nations.

It is to be regretted that the executive branch, through successive administrations since the early 1980's, has failed to exercise generally described international economic powers in a manner which does not infringe on the specific constitutional rights of Americans. Under those circumstances, I believe that it is incumbent on Congress to place explicit limits on the power which it has delegated to the President, in order to ensure that individual constitutional rights are protected.

I will focus my remarks today on the practical benefits to our national interest that flow from living by our national principles. Before I do so, let me just take stock of how far we have been able to come in vindicating these principles and what obstacles we have encountered.

On June 7, 1993, the day that the Foreign Affairs Committee on the House side was to have considered the legislation to significantly expand the right to travel, I received a letter from the Secretary of State. I was delighted that the letter endorsed the underlying objectives of the Free Trade in Ideas Act, affirmed "the administration's commitment to the dissemination of information and ideas as a significant element in the promotion of democracy, a central tenet of our foreign policy," and noted that "the free flow of ideas and information is also consistent with the maintenance and enforcement of economic embargoes" and "can advance, rather than hinder, the foreign policy goals which embargoes seek to accomplish".

The Secretary proposed in that letter that the Department of State "conduct on an expedited basis an interagency review of our existing sanctions programs, policies, and legislation to ensure that they properly reflect our mutual commitment to dissemination of information and ideas" and concluded that "in return, I ask that you agree to withdraw" the travel provisions "from the bill", (the State Department authorization bill), "when it comes before the full committee." I did so. I ask that a copy of that letter be part of this record.

Senator SIMON. It will be entered into the record.

[The letter from the Secretary of State to Representative Berman follows:]

THE SECRETARY OF STATE,
*Washington, DC, June 7, 1993.*

The Hon. HOWARD L. BERMAN,
*Chairman, Subcommittee on International Operations,*
*Committee on Foreign Affairs,*
*House of Representatives.*

DEAR MR. CHAIRMAN: I am writing in regard to the "Free Trade in Ideas Act of 1993", which is contained in Title II, Part E, of your legislation to authorize appropriations for fiscal years 1994 and 1995 for the Department of State.

I am pleased to take this opportunity to affirm the Administration's commitment to the dissemination of information and ideas as a significant element in the promotion of democracy, a central tenet of our foreign policy. If conducted in a manner which safeguards national security, and which does not merely constitute an informational pretext for evasion of the larger financial purposes of economic embargoes, the free flow of ideas and information is also consistent with the maintenance and enforcement of economic embargoes. Indeed, the free flow of information can advance rather than hinder the foreign policy goals which embargoes seek to accomplish.

Accordingly, the Department endorses the underlying objectives of the Free Trade in Ideas Act. Nonetheless, like you, we believe the Administration should retain the authority to control information flow for non-proliferation, anti-terrorism, export control and other highly compelling foreign policy or national security purposes. We also believe that the objectives of your legislation, for the most part, can be achieved through regulation although some statutory clarification of these matters may be useful.

I propose that the Department conduct, on an expedited basis, an inter-agency review of our existing sanctions programs, policies, and legislation to ensure they properly reflect our mutual commitment to the dissemination of information and ideas. We will consult closely with you and your staff during this review. In return, I ask that you agree to withdraw this Title from the bill when it comes before the full committee.

I hope this proposal will be satisfactory to you. I look forward to hearing from you.

Sincerely,

WARREN CHRISTOPHER.

Representative BERMAN. When the interagency review had failed to conclude, 10 months later, there had been no change proposed by the administration in the regulations governing these matters and the Senate had acted to express its sentiment in favor of the Free Trade in Ideas Act, we moved in conference on the State Department authorization bill to reinstate the provisions relating to freedom of travel.

We devised a compromise with the administration which resulted in the amendment of IEEPA, the International Emergency Economic Powers Act, to provide that as to all future embargoes imposed under that law, the authority given to the administration under that law could not form the basis for restrictions on travel.

I must emphasize this. Under all future embargoes except those imposed in times of war, the powers delegated to the President by Congress to restrict international commerce may no longer be used to restrict travel by Americans. We left untouched the power to restrict travel under existing embargoes against Libya and Iraq under IEEPA and against Cuba and North Korea, which are imposed under the authority of the Trading with the Enemy Act.

That compromise was based on a series of assurances by the administration that it intended to ease the existing travel restrictions for particular types of travel. Moreover, we also adopted in the State Department and USIA authorization bill Senate language expressing the sense of the Congress that the President should not restrict travel or other exchanges for informational, educational,

cultural, religious, or humanitarian purposes or for purposes of public performances or exhibitions.

The President signed the State Department and USIA authorization bill on April 30, 1994, and I just might add parenthetically that the decision of the conference committee at that time was unanimous, including a number of members from the State of Florida.

I was, therefore, dismayed and disappointed when the administration instead imposed new restrictions on travel to Cuba published in the *Federal Register* at the end of August. Those new regulations, which required individual applications for licenses which until then had been granted to defined categories of travelers, imposed further restrictions on scholars, researchers, and journalists and thus ran counter to the clear commitments made to Congress about the intention to expand opportunities for nontourist travel to Cuba and other countries under economic embargoes.

I am at a loss to understand how an administration which is committed to the free trade in ideas can impose additional restrictions on scholars and journalists.

The new regulations also restricted travel by close relatives. That issue has not been discussed in the context of the larger debate on travel because it was longstanding policy to allow such travel under general licenses and it was inconceivable to me that this might be restricted. Here, I am talking about the travel by close relatives, not the remittances coming from relatives to people who live in Cuba.

Travel by family members represents one of the principle ways in which ideas and information are carried into and out of Cuba, and restriction of it appears to be singularly counterproductive to U.S. interests. Family association is also a fundamental liberty interest and we have, in the past, criticized undemocratic governments for restricting it. Our latest restriction places us in a compromising position at precisely the moment we need to speak with moral authority in the making of Cuba policy.

The evidence of recent history, marked as it is by the worldwide ideological triumph of the United States, suggests exactly the opposite approach. Even at the height of the Cold War, we did not prohibit travel to Eastern Bloc countries. Indeed, we positively encouraged the exchange of artistic and literary work in an attempt to promote the opening of the cultural and political systems of those countries. Can there be any doubt that the larger the number of people crossing in both directions, the greater the trade in Bibles and *samizdat?*

This is a perfect example of self-interest corresponding with our deepest principles. In our economic and political life and in our approach to the marketplace of ideas, we believe in the supreme value of private effort and in the accomplishment of public purposes through cooperation or debate between the private efforts of ordinary people. The very best way to promote our values to the rest of the world is to embody them by having our people speak to those of other countries.

We also speak with greater moral authority when we embody the freedoms to which others inspire. Given the importance of intellectual freedom in our way of life and our system of values, how can

we curtail the rights of Americans to communicate and learn from observation? How can we cut off the flow of ideas to captive people who are starved of contact with the larger world of ideas and information?

In other words, essentially, in addition to the very good and sound constitutional reasons which you outlined in your opening comments, it is just a crazy policy for achieving our stated objectives in terms of our foreign policy with Cuba in particular and the embargoed countries generally.

On this last point, I want to offer concrete evidence to bolster what is self-evident. I recently met in Washington with an independent Cuban intellectual, one who has made the decision to stay there to promote change. His observations about the nature of Cuban society confirmed what my staff learned during a fact-finding trip to Cuba last December.

Most significant of all was the fact that dissidents with impeccable credentials, those who had suffered imprisonment and ill treatment, suggested that more contact with Americans and more travel to Cuba would benefit their efforts to restore freedom without violence.

They offered very practical reasons for this. The more travelers there are, the harder it is for the security agencies in Cuba to keep tabs on who meets whom, and the more cover there is for international human rights activity.

More foreign travelers also bring more outside attention to what is happening in the country. It is to be noted that Human Rights Watch, which is really second to none in having denounced the human rights violations by the Cuban Government, has nevertheless strongly endorsed the right to travel to Cuba.

Cuban dissidents whom my staff met did advocate maintaining an economic embargo as leverage, yet they saw no utility in restrictions on travel, which isolate and weaken popular forces more than the government.

They stressed that the United States is the best potential ally for the democratic movement in Cuba, if we get involved. They noted that in the situation of intellectual scarcity, those who cooperated most with the government were the likeliest to have access to information and communication, thus placing a premium on conformity, whereas the availability of more information and communication would level the playing field.

I know of no better way to avoid Cuban Government restrictions on such contacts than to trade on that government's dilemmas. It would like to restrict such contacts, yet wants the income that foreign travelers will bring. While it is true that there will be some foreign currency that will flow to the Cuban Government as a result, much will find its way into the expanding independent sector, including those disposed to challenge the government.

My Cuban interlocutor runs a small nongovernmental organization funded by Western European foundations. His organization and others like it are engaged in promoting independent cultural and intellectual activity. Again, my staff's findings suggest that these sectors consider U.S. artists and intellectuals their natural partners and that their efforts would benefit from more voluminous and less regulated contact.

Moreover, I believe that the small amounts of currency spent by travelers are far less significant than the political advantages to be gained by us. I recognize that there remains a concern about purely recreational tourism offering no opportunity for serious learning or communication, what is sometimes described as tourist apartheid. That is the real potential moneymaker for the Cuban Government. I believe that the nature of that sector of the travel industry would allow for restrictions in the form of prohibitions on package and group sales of such tourism. That would allow our concern about denying hard currency to the Cuban Government to be vindicated without burdening the constitutional liberties of Americans.

The end of the Cold War offers a lesson in the key to ideological success, which includes citizen-to-citizen exchanges. It also offers a new opportunity. We are finally free to live by our true faith. If ever fear was a justification for ignoring our liberties, it is no longer. We are infinitely stronger than any of the countries we have embargoed. At our best, we are confident in our national values, fear no outside ideas, and stand ready to vindicate our values and debate.

We are right to be confident because we possess in our Constitution a marvelous instrument of liberty. When we restrict freedom of movement and communication, we act more like our antagonists, thus eroding our moral authority and dissipating our effectiveness.

Thank you for letting me testify, Mr. Chairman.

[The prepared statement of Representative Howard L. Berman follows:]

PREPARED STATEMENT OF REPRESENTATIVE HOWARD L. BERMAN

Thank you, Senator Simon, for holding these hearings. As is apparent from my repeated efforts over several Congresses to have The Free Trade in Ideas Act enacted, I consider the right to travel and communicate with citizens of other countries among the most significant issues in our foreign policy.

Let me say at the outset that I strongly believe that the law should provide the power to the government, under certain circumstances, to regulate and restrict economic relations with countries, particularly in times of war. I also believe strongly that the use of such power can be a very significant instrument of diplomacy. Finally, I believe that the decision on which particular countries these powers should be used against, and of the particular measures to be employed, are in most cases most effectively made as executive decisions within legislative guidelines provided by Congress. It is for these reasons that I concur in the Congressional judgement to delegate its Constitutional authority over international commerce to the President in the Trading With the Enemy Act and the International Emergency Economic Powers Act.

That said, I believe that these economic powers must be exercised in a manner which does not infringe on the constitutional rights of Americans or, *as important,* does not run counter to other equally compelling foreign policy interests. You will hear today erudite arguments about the constitutional protection which travel and related activity should enjoy. I will therefore not enter into that, except to say that I am persuaded that the right to travel is constitutionally protected, and that it is closely related to the first amendment right of Americans to communicate and share ideas with citizens of other nations.

It is to be regretted that the executive branch, through successive administrations since the early 1980s, has failed to exercise generally described international economic powers in a manner which does not infringe on the specific constitutional rights of Americans. Under those circumstances, I believe that it is incumbent on Congress to place explicit limits on the power which it has delegated to the President, to ensure that individual constitutional rights are protected.

I will concentrate my remarks today on the practical benefits to our national interests that flow from living by our national principles. Before I do so, let me take

stock of how far we have been able to come in vindicating these principles, and what obstacles we have encountered.

Several Congresses ago, I introduced the Free Trade in Ideas Act, to vindicate the right of Americans to travel freely to other countries, and to communicate with the citizens of those countries, as guaranteed by the Helsinki Accords. One portion of that became law as an amendment (commonly known as the "Berman Amendment") to the Omnibus Trade and Competitiveness Act of 1988. As a result, the import or export of publications, recordings, films and other informational materials was explicitly exempted from direct or indirect regulation or prohibition under the Trading With the Enemy Act and the International Emergency Economic Powers Act. However, prohibitions on most travel to many embargoed countries continued to be a part of the regulations of the Treasury Department's Office of Foreign Assets Control (OFAC).

Moreover, OFAC continued to interpret the Berman amendment in a manner which limited its natural meaning. Thus, despite the language forbidding "direct or indirect" regulation or prohibition, OFAC continued to take the position that it had discretion to grant or deny a license for travel by persons engaged in protected export or import of informational materials. This in effect amounted to a restriction in some cases of activities which Congress had explicitly exempted from regulation or prohibition. OFAC also interpreted the scope of the amendment to deny its protection to electronically transmitted information, creating the anomalous situation that the identical information could be prohibited or permitted depending solely on the means of its transmission.

In order to deal with these problems, and to address the long-standing problem of restrictions on foreign travel by American citizens, I have twice reintroduced omnibus Free Trade in Ideas legislation, which also attempts to protect establishment of news bureaus, telecommunications, and private educational and cultural exchanges.

I recognize the legitimacy of regulating, and even prohibiting, communications which have genuine national security implications. There can be no doubt about my efforts over the years to prevent nuclear proliferation and terrorism. I do not believe that the freedom of intellectual exchange should include scientific collaboration which would undermine our non-proliferation or anti-terrorism efforts. For precisely this reason, the Berman amendment provided that its protection did not apply to activities described in the Export Administration Act or the espionage provisions of the criminal code.

What we are talking about here is not terrorism, espionage or proliferation. The absurdity of a prohibitive policy toward international communication is suggested by the following examples. The highly respected Soros Foundation, a pioneer of democracy and human rights programs in Eastern and Central Europe, found its capacity to support democratic forces in Serbia inhibited by restrictions on the export of equipment for use by opposition media. In other cases, American scholars, professionals and artists have been denied the opportunity to have personal contact and exchanges with their counterparts abroad. For example, the Guggenheim Foundation was forced to terminate its support for the international work of one of the preeminent ethno-musicologists in his field. In other cases, foreign academics and artists have not been able to come to the United States, thus depriving their prospective American interlocutors and audiences of the opportunity to hear them, or exchange ideas with them.

Some of these cases raise issues which transcend the scope of the laws relating to international economic embargoes. The cases of foreign academics and artists denied entry to the United States, in violation of the first amendment right of Americans to receive information, suggest that the laws and policy relating to issuance of visas require a thorough overhaul. And in fairness to OFAC I must note that those visa policy problems are the sole responsibility of the Department of State. While I acknowledge that the Department has made some progress in this area, its decisions still continue to be marked by a high degree of ideological bias. Moreover, even when the Department has reversed unfavorable decisions in response to protests in particular cases, its niggardly policy has seriously hampered effective advance planning of such dialogue and exchanges, of conferences or concert tours.

I have dwelt at some length on issues other than the narrow question of Americans' ability to travel to embargoed countries because I believe that the question of travel is part of a larger issue, that issue being the right to communicate and the benefits which accrue from that. It is for this reason that in successive pieces of legislation, I have sought to address several of these related issues together.

Early in this Congress, the provisions of H.R. 1579, the Free Trade in Ideas Act, were included in their entirety in the State Department and US Information Agency Authorization bill for Fiscal Years 1994 and 1995 as I introduced it to the Inter-

national Operations Subcommittee. These provisions included amendments to clarify the scope of the original Berman amendment, and provisions to ensure that the statutory embargo authorities of the President were not used to restrict travel in any fashion except, in a very significant concession to those concerned with the maintenance of the embargo on Cuba, for purely recreational tourism to Cuba. The bill reached the Foreign Affairs Committee in modified form, without the general protection for all travel, but with significant provisions protecting travel for educational, scientific and cultural purposes.

The deletion of the general protection for travel from the Authorization bill caused me concern. While it is valuable to have opportunities for travel for specified purposes, if the government retains the power to define which travel is or is not educational it could use its power to restrict all other forms of travel in a manner which could disfavor unpopular points of view. Allowing the government the power to express its ideological biases, or to ignore powerless or unpopular groups or individuals, is highly dangerous to the principle of ideological neutrality which the spirit of the first amendment requires.

Nor was this simply an abstract or theoretical concern. Before the recent changes made by the Clinton Administration, further restricting the categories of people who may travel to Cuba, OFAC regulations had provided a "general license", that is permitted travel without prior permission, for travel by persons who were professional researchers on Cuban issues. Nevertheless, OFAC in the past had employed threats of enforcement action not authorized by law to intimidate, and thus abort, a delegation led by an academic expert on Cuban broadcasting, which was to study an issue of significant foreign policy interest to the United States. Significantly, the delegation was to have included a member of the House of Representatives.

Despite my concern that the failure to protect all travel would still result in abuses, I considered the limited liberalization of educational travel that the Foreign Affairs Committee had before it in June 1993, in the State Department and USIA Authorization bill, a significant advance. On June 7, 1993, the day that the Committee was to have considered the legislation, I received a letter from the Secretary of State which "endorse(d) the underlying objectives of the Free Trade in Ideas Act"; "affirm(ed) the Administration's commitment to the dissemination of information and ideas as a significant element in the promotion of democracy, a central tenet of our foreign policy"; and noted that "the free flow of ideas and information is also consistent with the maintenance and enforcement of economic embargoes" and "can advance rather than hinder the foreign policy goals which embargoes seek to accomplish." The Secretary proposed that the Department of State "conduct, on an expedited basis, an inter-agency review of our existing sanctions programs, policies and legislation to ensure they properly reflect our mutual commitment to the dissemination of information and ideas", and concluded that "In return, I ask that you agree to withdraw this Title (The Free Trade in Ideas Act) from the bill when it comes before the full committee." I did so. (I ask that a copy of that letter be made a part of the record.)

Ten months later, despite assertions by the Administration that they intended to broaden the permitted bases for travel, the inter-agency review had failed to conclude, and there had been no change proposed by the Administration in the regulations governing these matters. Indeed several examples of continuing problems had arisen. Meanwhile, the Senate had acted to express its sentiment in favor of the free trade in ideas on the State Department and USIA Authorization bill. Accordingly, we moved in conference to reinstate the provisions relating to freedom to travel, and export and import information.

As we moved forward with this process, we engaged in a detailed negotiation with the Administration, as a result of which we reached agreement on changes to the informational materials provisions which the Administration could accept, and were assured that if we would agree to drop the insistence on statutory provisions on the right to travel, the Administration would move expeditiously to broaden the permitted bases for travel.

We devised a compromise on the travel issue which resulted in the amendment of the International Emergency Economic Powers Act (IEEPA) to provide that, as to all future embargoes imposed under it, its authority could not form the basis for restrictions on travel. I must emphasize this: under all future embargoes, except those imposed in times of war, the powers delegated to the President by Congress to restrict international commerce may no longer be used to restrict travel by Americans. We left untouched the power to restrict travel under existing embargoes, against Libya and Iraq under IEEPA, and against Cuba and North Korea which are imposed under the authority of the Trading With the Enemy Act (TWEA). The latter points up an anomaly worthy of note. The embargoes against Cuba and North Korea

are, under a grandfather clause, based on the authority of a statute otherwise restricted to times of war.

I would emphasize that the compromise was itself based on a series of assurances by the Administration that it intended to ease the existing travel restrictions for particular types of travel. I was therefore dismayed and disappointed when it instead imposed new restrictions on travel to Cuba, published in the Federal Register on August 30, 1994. Those new regulations, which required individual applications for licenses which till then had been granted to defined categories of travelers, imposed further restrictions on scholars, researchers and journalists, and thus ran counter to the clear commitments made to Congress about the intention to expand opportunities for non-tourist travel to Cuba and other countries under economic embargoes. I am at a loss to understand how an Administration which is committed to the free trade in ideas can impose additional restrictions on scholars and journalists.

The new regulations also restricted travel by close relatives. That issue had not been discussed in the context of the larger debate on travel because it was long standing policy to allow such travel under general licenses, and it was inconceivable to me that this might be restricted. Travel by family members represents one of the principal ways in which ideas and information are carried into and out of Cuba, and restriction of it appears to be singularly counter-productive to U.S. interests. Family association is also a fundamental liberty interest, and we have in the past criticized undemocratic governments for restricting it. Our latest restriction places us in a compromising position at precisely the moment we need to speak with moral authority in the making of Cuba policy.

The Administration sought to justify these restrictions on the grounds that requiring individual license applications would not burden legitimate travel because OFAC would promptly approve all *bona fide* applications. However, the record suggests otherwise. Organizations seeking licenses for research travel have had difficulty communicating with OFAC, sometimes experiencing delays as long as five days in even reaching the office by telephone. OFAC has indicated to more than one license applicant that it is overwhelmed by the sheer volume of license applications, that it is giving priority to applications for licenses for family travel, that it does not have sufficient qualified staff to meet that need, and that it cannot guarantee that research and academic licenses, or licenses for statutorily permitted trade in informational materials, will be processed at all promptly.

This is, of course, a predictable result of requiring individual applications for licenses in cases which hitherto have been governed by general licenses for defined purposes. In any case, the practical result is that the new regulations will seriously inhibit precisely the kinds of contact which we ought to be encouraging between the peoples of the United States and Cuba.

The evidence of recent history, marked as it is by the worldwide ideological triumph of the United States, suggests exactly the opposite approach. Even at the height of the Cold War, we did not prohibit travel to Eastern Bloc countries. Indeed, we positively encouraged the exchange of artistic and literary work in an attempt to promote the opening of the cultural and political systems of those countries. Can there be any doubt that the larger the number of people crossing in both directions, the greater the trade in bibles and *samizdat?*

This is a perfect example of self-interest corresponding with our deepest principles. In our economic and political life, and in our approach to the "marketplace of ideas", we believe in the supreme value of private effort, and in the accomplishment of public purposes through cooperation or debate between the private efforts of ordinary people. The very best way to promote our values to the rest of the world is to embody them, by having our people speak to those of other countries.

We also speak with greater moral authority when we embody the freedoms to which others aspire. Given the importance of intellectual freedom in our way of life and our system of values, how can we curtail the rights of Americans to communicate and learn from observation? How can we cut off the flow of ideas to captive peoples who are starved of contact with the larger world of ideas and information.

On this last point, I can offer concrete evidence to bolster what is self-evident. I recently met in Washington with an independent Cuban intellectual, one who has made the decision to stay there to promote change. His observations about the nature of Cuban society confirmed what my staff learned during a fact-finding trip to Cuba last December. Most significant of all was the fact that dissidents with impeccable credentials, those who had suffered imprisonment and ill-treatment, suggested that more contact with Americans and more travel to Cuba would benefit their efforts to restore freedom without violence. They offered very practical reasons for this. The more travelers there are, the harder it is for the security agencies to keep tabs on who meets whom, and the more cover there is for international human

rights activity. More foreign travelers also bring more outside attention to what is happening in the country. It is to be noted that Human Rights Watch, which is second to none in having denounced the human rights violations by the Cuban government, has nevertheless strongly endorsed the right to travel to Cuba. Cuban dissidents whom my staff met with did advocate maintaining the economic embargo as leverage. Yet they saw no utility in restrictions on travel which isolate and weaken popular forces more than the government. They stressed that the United States is the best potential ally for the democratic movement in Cuba, *if* we get involved. They noted that, in a situation of intellectual scarcity those who cooperated most with the government were the likeliest to have access to information and communication, thus placing a premium on conformity, whereas the availability of more information and communication would level the playing field. I know of no better way to avoid Cuban government restrictions on such contacts than to trade on that government's dilemmas. It would like to restrict such contact, yet wants the income that foreign travelers will bring. While it is true that there will be some foreign currency which will flow to the Cuban government as a result, much will find its way into the expanding independent sector, including those disposed to challenge the government.

My Cuban interlocutor runs a small non-governmental organization funded by West European foundations. His organization and others like it are engaged in promoting independent cultural and intellectual activity. Again, my staff's findings suggest that these sectors consider U.S. artists and intellectuals their natural partners, and that their efforts would benefit from more voluminous and less regulated contact.

Moreover, I believe that the small amounts of currency spent by travelers are far less significant than the political advantages to be gained by us. I recognize that there remains a concern about purely recreational tourism offering no opportunity for serious learning or communication, what is often described as "tourist apartheid". That is the real potential money-maker for the Cuban government. I believe that the nature of that sector of the travel industry would allow for restrictions in the form of prohibitions on package and group sales of such tourism. That would allow our concern about denying hard currency to the Cuban government to be vindicated without burdening the Constitutional liberties of Americans.

The end of the Cold War offers a lesson in the key to ideological success, which includes citizen to citizen exchanges. It also offers a new opportunity. We are finally free to live by our true faith. If ever fear was a justification for ignoring our liberties, it is so no longer. We are infinitely stronger than any of the countries we have embargoed. At our best we are confident in our national values, fear no outside ideas, and stand ready to vindicate our values in debate. We are right to be confident, because we possess in our Constitution a marvelous instrument of liberty. When we restrict freedom of movement and communication, we act more like our antagonists, thus eroding our moral authority and dissipating our effectiveness.

Senator SIMON. I thank you for an excellent statement.

I find only one minor area where I might differ with you. I would even be opposed to restricting package and group sales to visit places.

But overall, your statement is absolutely on target and you are correct when you say it wasn't too long ago we were criticizing the Soviets because of their restrictions on their citizens to travel.

Let us take three extreme examples, Castro in Cuba, Saddam Hussein in Iraq, and Gaddafi in Libya. Are they more threatened by—and you by implication answered this, but I think it is important to get it on the record real clearly. Are they more threatened by our present policy or having 1,000 Americans visit Cuba or Baghdad or Tripoli?

Representative BERMAN. I certainly feel that the latter is more threatening to them. I think those Americans become the basis for undermining the controls that they seek to impose on their entire societies.

Senator SIMON. I concur completely. As a House member, I remember visiting both Libya and Baghdad. They are both very grim.

I remember how they got shook up by one lonely House member going over and visiting there. And I had one staff person with me.

I also remember the Soviet Union, in the old days. If you recall, when you were in a hotel in Moscow they assigned you a table and you didn't have a choice of where you were going to eat or anything. I can remember we would have our discussions and they just gave us the food. You didn't have any choice and a menu or anything. The waiter, whom we assumed knew no English, would come and wait on us. Then we went to Kiev in the Ukraine and lo and behold, the same waiter showed up to serve our table there in Kiev.

They get obsessed with just a handful of people. I think one of the reasons you have had as much progress as you have had in China, and the reason for Tiananmen Square, is all the exchange that we have had, Chinese students over here, Americans visiting China. I think it helps to open the process.

Part of your statement interested me, because I asked both the State Department and the Justice Department to come and testify today. Both declined to testify. I am going to keep the record open for a short time in case they want to enter a statement in the record.

But I think that Congressman Berman and Paul Simon of the Senate, we ought to be continuing to push both the State Department and the Justice Department and telling them we think that the right to travel is a fundamental liberty.

Representative BERMAN. I fully intend to. You were one of the most outspoken advocates of economic sanctions against South Africa back in the early- and mid-1980's, but neither you nor any one of the other proponents of sanctions ever suggested at that point that part of the sanctions should be to keep Americans from going to South Africa to be able to meet with antiapartheid groups, to be able to investigate human rights conditions.

Take Nicaragua, even, where we had sanctions against the Sandanista government. Even there, we didn't impose any sanctions on the right of Americans to travel down there, and it became a tremendous source of information about what really was happening, in some cases working to the disadvantage of the government that we were seeking to pressure.

You mentioned in your opening statement about the appropriate places where you might impose some restrictions on the right to travel. The Passport Act very specifically speaks to that, and it says at a time of war or in a situation where the safety of Americans is in danger. I can understand at the height of the crisis in Lebanon, where every American was getting kidnaped and held hostage, that we had to take a very firm position discouraging travel there, both for the safety of those people and because it had a very heavy impact on our foreign policy.

But those Passport Act things are related to conditions like protection of the safety, epidemics and health, a state of war, tailored situations nothing like what we are talking about with respect to these countries.

Senator SIMON. Absolutely not. Now we are talking about political convenience rather than anything else.

You mentioned that you received a letter from the State Department saying they were going to review their policies. Did they indi-

cate how long a time they were going to give you, when they were going to review?

Representative BERMAN. We have two different reviews. We have the review that started in 1993, which caused the Secretary to write a letter supporting the principles behind the Free Trade in Ideas Act, and that review, I think, was sort of done but not completed, if you know what I mean.

Then we acted again when that bill went to conference committee in April of 1994, and in the discussions there they suggested passing the sense of Congress resolution and that that would give the strength—there is a struggle inside the administration and there are forces within the administration who want to end this. They thought, with Congress speaking, the Congress that some might fear would bash them if they acted unilaterally, had now spoken about opening up humanitarian, educational, cultural exchanges, people-to-people programs, and that they would respond quickly.

Nothing much happened, and then, of course, we had the crisis with the refugees from Cuba and all of a sudden, one of the sanctions began to tighten up and to go from the general license to the specific license, where you have to specifically get approval of the purpose of your specific trip. It is sort of a prior restraint kind of a formulation; compared to a general license, which establishes the guidelines, and if you violate them, you are subject to criminal prosecution.

So things have actually become worse as a result of what has happened rather than the opening up that we had expected.

Senator SIMON. Is it inaccurate to summarize your testimony as saying, first of all, the restriction on the right to travel is a restriction on Americans' abilities to get information about what is happening in other countries, and second, from a very practical international political point of view, the restriction on travel is, in fact, a benefit to dictators in countries where they don't want a free flow of ideas?

Representative BERMAN. I just can't help but assume it is not totally coincidental that where travel was not restricted, totalitarian regimes toppled. Where travel was restricted, we still face totalitarian regimes. I don't want to make too much of that, but it is out there to at least think about.

Senator SIMON. Absolutely. We thank you very, very much for your testimony, and more than that, for your leadership. You have been out in the forefront on this issue. While I have been sympathetic, I haven't done that much, I have to confess. You have been out there working, and I really appreciate it. Thank you very, very much.

Representative BERMAN. Thank you, Mr. Chairman. That is very nice.

Senator SIMON. My staff just reminded me, I am going to have to recess for 15 minutes to run down to appear before the Armed Services Committee just very briefly. We will recess for 15 minutes and I will be back, I hope even before 15 minutes. Thank you.

[Recess.]

Senator SIMON. The hearing will be resumed. My apologies. We are at the end of a session and there is a certain amount of chaos

at the end of the session. In addition to testifying before the Armed Services Committee briefly, I had to try and salvage some legislation that is wandering through.

For the remainder of the witnesses, let me just remind everyone we are going to follow the 5-minute rule. We will enter your full statements in the record, but because of the time constraints, we are going to have to follow the 5-minute role and try and devote sometime to discussion of these issues.

Our first panel is Kate Martin, director of the Center for National Security Studies of the American Civil Liberties Union and Robert Turner, the Charles E. Stockton Professor of International Law at the U.S. Naval War College.

We are very pleased to have both of you here and look forward to your testimony.

Ms. Martin?

**PANEL CONSISTING OF KATE MARTIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, AMERICAN CIVIL LIBERTIES UNION; AND ROBERT TURNER, CHARLES E. STOCKTON PROFESSOR OF INTERNATIONAL LAW, U.S. NAVAL WAR COLLEGE**

**STATEMENT OF KATE MARTIN**

Ms. MARTIN. Thank you, Senator Simon.

We appreciate the opportunity to appear to testify today. I must say that we fundamentally agree with all of your remarks and Congressman Berman's remarks today. I might just expand a little bit on the constitutional right to travel and what I think the Congress should do about that.

I don't believe there can be any serious dispute today that there is a constitutional right to travel, that it is not only a part of basic liberty referred to in the Declaration of Independence, guaranteed by the fifth amendment, and, I would submit, also part of the ninth amendment, and that it is also an essential aspect of first amendment freedoms.

Each of the three branches of government, which, of course, have an independent obligation to interpret and abide by the Constitution, appears to agree with this conclusion. The Congress, most recently in the State Department authorization bill, explicitly said that there was a constitutional right to travel, and, in fact, acted to protect that right in all future economic embargoes.

In 1978, the Congress also acted to protect that right by amending the Passport Act to prohibit area restrictions on the use of passports except in places where there are armed hostilities or the American travelers face physical dangers. We believe that that is the correct standard here for the President's ability to restrict the rights of Americans to travel abroad. He already has that authority under the Passport Act and we believe that that is the only authority that he should have, and that that covers the national security problems.

The executive branch itself, in a recent report issued by the State Department about U.S. compliance with the International Covenant on Civil and Political Rights, states unequivocally that there is a constitutional right to travel internationally.

The Supreme Court has, in several cases, discussed the constitutional right. I would like to just read very briefly what I think is one of the most eloquent descriptions of how that right implicates first amendment freedoms. Justice Douglas, quoting a constitutional scholar in the case of *Kent* v. *Dulles,* explains, "Travel abroad helps Americans to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our Government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways, direct contact with other countries contributes to sounder decisions at home."

That is, of course, the essence of what the first amendment is about, participation in public debate on public policy issues.

While it is true that there are several Supreme Court decisions upholding restrictions on the right to travel, usually by narrow margins, in each of those cases, the restrictions were upheld only because the Court found that they were justified by the weightiest considerations of national security. Each one of those cases was decided during the Cold War, when the very existence of the United States was deemed threatened by the Soviet Union and international communism, and the Government argued that the travel restrictions at stake in those cases were essential to the national security, that is, the defense and the continuation of the existence of the United States.

More specifically, in the 1982 case of *Regan* v. *Wald,* where the Cuban travel ban was upheld, the Court found that the specific national security justifications cited by the government at the time justified the travel ban. Those justifications were that Cuba was a satellite of the Soviet Union, that it had troops in Angola, and that it was supporting insurrection in the Western Hemisphere. None of those considerations, of course, are true any longer.

In fact, the current justification for the travel restrictions, we submit, can in no way meet the required test for infringing on this constitutional right. The current reason is that restricting these rights promotes human rights and democracy in Cuba, the objective of our current foreign policy. But to say that is to demonstrate that such an objective, however laudable in itself, cannot possibly justify restricting human rights and democracy in the United States.

Senator SIMON. If you could summarize the balance of your remarks.

Ms. MARTIN. We would urge the Congress at this moment to pass a statute outlining restrictions on travel under the economic embargo laws. For the reasons that Congressman Berman summarized, we can no longer depend on the administration's stated commitment to the principle of free trade and ideas.

I would simply like to point out that since August 26, when the administration changed the travel restrictions, the travel restrictions on going to Cuba are now worse than they were ever during the Cold War under Presidents Reagan and Bush. Family visits were not banned and it was never as difficult for journalists, pro-

fessional researchers, students, scientists, and others to travel to Cuba as it is today.

We think that it is clear that Congressional action is now necessary to protect all travel.

[The prepared statement of Kate Martin follows:]

PREPARED STATEMENT OF KATE MARTIN

CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: I am very pleased to have this opportunity to testify on behalf of the Center for National Security Studies of the American Civil Liberties Union on the constitutional right to travel. The ACLU is a non-profit, non-partisan organization, with over 275,000 members, dedicated to the protection of civil liberties and the democratic process. The ACLU takes no position on substantive matters of U.S. foreign policy, including the Cuban embargo, except to the extent that such policies violate individual liberties or the democratic process.

INTRODUCTION

The right to travel is a fundamental aspect of individual liberty protected by both international law and the Constitution. It is also essential to the exercise of First Amendment freedoms. The Supreme Court recognizes the right, and the Congress has acted repeatedly to protect the right against infringement by Executive branch actions.

The current travel ban on travel to Cuba imposed under the Trading With the Enemy Act (TWEA), violates this fundamental right. Bureaucratic enforcement of the current restrictions has been arbitrary and involved improper government inquiries and censorship. Moreover, the administration's most recent actions tightening the Cuban travel restrictions also violate its commitments made to Congress earlier this year.

The 1982 Supreme Court case, *Regan* v. *Wald,* which rejected a challenge to the Cuba travel ban then in effect, is no authority for the continuation of the present restrictions in this post-Cold War world. The opinion in that case, written by Justice Rehnquist for a narrow 5–4 majority did not hold that there was no constitutional right to travel. Nor did it hold that the government may restrict travel whenever it deems such restrictions useful. To the contrary, *Regan* held only that when the government asserts the weightiest of national security reasons, important to the military defense of the United States, for restricting travel, the court will defer to such reasons. The reasons found sufficient in that case—all related to the existence of the Cold War—no longer exist. The current justification proffered for the travel ban—to promote democracy and human rights in Cuba—does not as a matter of law or common sense justifying restricting the human rights of Americans.

The events of the last fifteen months demonstrate that protection of this constitutional right will never be secure so long as it can be held hostage to the political or foreign policy objectives of the moment. Congress should act now to protect this right, by prohibiting all travel restrictions imposed under economic embargoes.

The constitution Protects the Right to Travel. Most Americans do not realize that it is a crime for them to travel to Cuba and would be shocked to find out that is the case. They instinctively understand that the right to travel freely is part of the basic liberty which our democratic government was established to protect. Indeed, the Universal Declaration of Human Rights, Art. 13, recognizes the right to travel both inside one's country and internationally. The Supreme Court has repeatedly recognized that the right to travel is protected under the Fifth Amendment as a liberty interest that cannot be deprived without due process of law.[1] Indeed, even the Executive Branch concedes that "the right to travel—both domestically and internationally—is constitutionally protected," although it violates this principle in action. Report of the United States of America Under the International Covenant on Civil and Political Rights, (ICCPR Report) July 28, 1994, Art. 12, p. 99.

Moreover, restrictions on the right to travel must be judged against the central principle of the First Amendment: "Congress shall make no law * * * abridging the freedom of speech," means that every person is free to speak her mind about the actions of the government and to participate in the debate about the great issues of the day. To participate effectively in this process, private persons must have access to information. To participate in debate about foreign policy questions, they

[1] *See Regan* v. *Wald,* 468 U.S. 222 (1984); *Zemel* v. *Rusk,* 381 U.S. 1, 14 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505–06 (1964); *Kent* v. *Dulles,* 357 U.S. 116, 125 (1958).

must have access to information about events taking place in the world. It would seem beyond debate that, except in the most compelling circumstances, the government may not interfere with the ability of private citizens to find out for themselves what is going on around the world and to use that information to influence public debate.

As the Supreme Court has explained:

> * * * In Anglo-Saxon law that right [to travel] was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution of 1787 (1956), 171–181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, * * * was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. * * * "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."

Freedom of movement also has large social values. As Chafee put it:

> Foreign correspondents and lecturers on public affairs need firsthand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad * * * helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home."

(Citations and footnotes omitted.) *Kent* v. *Dulles,* 357 U.S. at 126–127.

Nevertheless, there is a long history of efforts to abridge Americans' right to travel, usually in the name of some foreign policy goal, such as fighting communism or promoting democracy, sometimes, to punish Americans holding minority political views. Each political branch has at different times, acted both to protect and to restrict the right, depending on the prevailing political winds. At times, the Supreme Court has wavered in its commitment to this fundamental right. However, history demonstrates a growing and inexorable recognition that the sharing of information and ideas by travel and otherwise is a cornerstone of individual liberty, and essential to the building of democracy.

It has become increasingly clear that banning travel by Americans to foreign dictatorships has never resulted in the avowed goal of undermining that dictatorship. Indeed the current Administration no longer even attempts to justify the Cuban travel ban on that basis. They, like all serious observers, recognize the positive benefits democratic forces derive from the sharing of information and ideas. Thus, they are driven to pretend that in banning travel, they are not banning the sharing of information and ideas, but only implementing currency regulations. Testimony of Alexander Watson, Assistant Secretary of State, Joint Hearing on U.S. Policy and the Future of Cuba, Subcommittees on Economic Policy, Trade, and Environment; Western Hemisphere Affairs; and International Operations; of the Committee on Foreign Affairs of the House of Representatives, Nov. 18, 1993, p. 19.

In recent years, protection of the right to travel and to share information and ideas has fallen mainly to the Congress. In particular, Congressman Howard Berman has been instrumental in passing Free Trade In Ideas legislation, first in 1988, then in 1991, and again this year. The recent tightening of the Cuban travel ban demonstrates the necessity for Congress to act again.

## HISTORY OF THE RIGHT TO TRAVEL

Historically, Americans' right to travel was regulated under the Passport Act, not the economic embargo laws. For the first hundred years of travel regulations, travel was restricted only during time of war. Although Congress passed the first Passport Act in 1856, it did not make it illegal to travel without a passport until 1918. The 1918 statute delegated to the President the right during time of war, to impose by proclamation, a requirement that U.S. citizens use a passport when entering or

leaving the country. In 1918 and again in 1941, the President issued such proclamations. In 1952, as part of the McCarren-Walter Act, the Congress again delegated power to the President to proclaim a national emergency during which use of a passport would be required and in 1953, President Truman declared the situation in North Korea to be a national emergency. Immigration and Nationality Act §215. Only in 1978, when Congress otherwise restricted the President's authority, did it permit him to always require a passport for entering or leaving the country. 8 U.S.C. §1185(b).

During the McCarthy era, the government also sought to deny the right to travel to certain Americans based on their political beliefs. That practice was not finally outlawed until 1991 when Congress amended the Passport Act. In 1952, the Secretary of State declared pursuant to the delegation provision in the 1926 Passport Act that passports were not to be issued to members of the Communist Party for reasons of national security. This prohibition was challenged as unconstitutional and unauthorized and in 1958, the Supreme Court struck it down on the ground that Congress had not authorized it. *Kent* v. *Dulles,* 357 U.S. 116 (1958).

Six years later, the Court again considered the issue of revocation of passports of Communists and this time held a statute specifically authorizing such revocation unconstitutional. *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964). In this case, the Subversive Activities Control Act specifically provided that members of the Communist party should have their passports revoked. There being no issue whether the Executive had authority to revoke the passports, the Court was forced to reach the constitutional issue and struck down the law as overly broad and indiscriminate. Justice Douglas declared that absent war, the government had no power to keep a citizen from traveling unless there was power to detain him or her.

Nevertheless, as late as 1981, the Executive Branch continued to assert that the President's foreign policy powers include the right to revoke an American's passport in order to prevent her from denouncing U.S. policy abroad. See *Haig* v. *Agee,* 453 U.S. 280 (1981). In 1991, Congress amended the Passport Act to prohibit revocation of passports on the basis of activities protected by the First Amendment.

The Executive Branch also sought to restrict the travel rights of Americans by putting area restrictions on the use of passports. In *Zemel* v. *Rusk,* 381 U.S. 1 (1965) the Supreme Court decided that the statutory language, which had been held not to authorize the President to refuse passports to Communists, did authorize the President to refuse to validate passports for travel to Cuba. The Court went on to find the passport restriction on travel to Cuba to be constitutional, because it was supported by the "weightiest considerations of national security."

However, even as the Supreme Court deferred to the Executive concerning passport controls, the Congress became increasingly active in protecting that right against executive limitation. In 1978, Congress rejected the result in *Zemel* and explicitly prohibited the President from imposing geographic restrictions on the use of passports under the Passport Act except "where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers." 22 U.S.C. §211a. In our judgment, this provision of the Passport Act includes all circumstances, in which the government may legitimately ban travel.

Indeed, in the late 1970's, Americans' right to travel and in particular their right to travel to Cuba was for a time secure. Although the trade embargo of Cuba first declared in 1963 under the TWEA, included restrictions on travel by Americans, in 1977, President Carter lifted the ban to permit all Americans to travel to Cuba, for any purpose. Thereafter, Congress amended the Trading with the Enemy Act to restrict its invocation by the President to times of war, although it grandfathered existing restrictions. When Congress also amended the Passport Act in 1978 to prohibit the Executive from imposing geographic restrictions on the use of U.S. passports except in narrowly limited circumstances, it appeared that the right to travel had been protected.

However, in 1982, President Reagan found a way around the limitation in the Passport Act by using the trade embargo statute to impose currency restrictions on travel to Cuba. President Reagan prohibited all travel to Cuba except by journalists, professional researchers, and persons visiting close relatives, or where Cuba hosted the travel. Americans seeking to travel to Cuba brought suit challenging the reimposition of the ban on the grounds that the President did not have the authority to impose it under the TWEA. They argued that when Congress repealed the President's national emergency powers under TWEA, the grandfather clause preserving "the authorities" "which were being exercised with respect to a country on July 1, 1977" did not include authority to impose a travel ban not in effect in July, 1977.

The appeals court struck down the travel ban as unauthorized, based on earlier Supreme Court decisions requiring a narrow construction of delegated presidential

powers restricting the right to travel.[2] The appeals court also reasoned that the 1978 Passport Act amendment prohibiting geographic restrictions on the use of passports would be meaningless if the President could achieve the same result by imposing currency restrictions under the trade embargo laws.

The Supreme Court, with Justice Rehnquist writing the opinion, reversed. *Regan* v. *Wald,* 468 U.S. 222 (1984). Taking an expansive view of the President's powers in areas affecting foreign policy, the Supreme Court read the grandfather clause broadly to authorize the subsequent travel restrictions. The Court did not explain how its conclusion could be reconciled with Congress' explicit prohibition of the imposition of geographic restrictions on the right to travel. It upheld the travel restrictions, by a 5–4 vote, because of the overriding national security concerns asserted by the government. Specifically, the Court relied on State Department assertions that the influx of hard currency from beach tourism and other travel to Cuba posed a threat to the national security of the United States because Cuba was allied with the Soviet Union, was supporting armed insurrection in the Western Hemisphere, and had 40,000 troops stationed in Africa and the Middle East in support of objectives inimical to U.S. national security interests. 468 U.S. at 243.[3]

Of course, none of these national security concerns exist today. The Soviet Union no longer exists. Cuba poses no threat to the national defense of United States. It no longer has troops stationed in Africa or elsewhere and is no longer providing support for violence in the Western Hemisphere.

CURRENT DEVELOPMENTS: 1994 FREE TRADE IN IDEAS ACT

After the end of the Cold War, Congress again took up the issue of travel restrictions. In 1993, Rep. Howard Berman introduced H.R. 1579, the "Free Trade in Ideas Act of 1993" to prohibit trade embargo restrictions on the free exchange of information and to protect the right to travel.

In June, 1993, Secretary of State Warren Christopher wrote Mr. Berman a letter asking him to withdraw the provision in exchange for regulatory reform and "an inter-agency review of our existing sanctions programs, policies, and legislation to ensure they properly reflect our mutual commitment to the dissemination of information and ideas."[4] Secretary Christopher also affirmed "the Administration's commitment to the dissemination of information and ideas as a significant element in the promotion of democracy" and expressly endorsed "the underlying objectives of the Free Trade in Ideas Act." *Id.* In response, Congress deferred further consideration of the bill.

When the Executive Branch review was not finished by the spring of 1994, Congress enacted the 1994 Free Trade in Ideas Act as part of the State Department Authorization Act. In passing this bill, Congress explicitly recognized that constitutional rights were at stake and acted to prohibit travel bans being imposed as part of future embargoes. H. Rept. 103–482, at 238. The Act amends the International Emergency Economic Powers Act (IEEPA) to prohibit any restrictions on travel (including currency restrictions) in any future embargoes imposed pursuant to the IEEPA. The provision exempts all current IEEPA embargoes from this requirement, and it does not apply to embargoes under the TWEA, such as Cuba and North Korea. The Clinton Administration opposed this change. This is an important protection for future embargoes, although it does not explicitly apply to embargoes imposed by the United Nations and implemented pursuant to the United Nations Participation Act.

Based on its understanding of the Administration's commitment to the principle of free trade in ideas and the unfinished status of the inter-agency review, the Congress did not pass binding legislation governing travel under current embargoes. It did, however, pass a non-binding Sense of the Congress resolution that "the President should not restrict travel or exchanges for informational, educational, religious, cultural, or humanitarian purposes or for public performances or exhibitions, between the United States and any other country." The conference report accompany-

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[2] The Executive Branch agrees that a narrow construction of "all delegated powers that curtail or dilute citizens' ability to travel" is required. ICCPR Report at 99, *Kent* v. *Dulles,* 357 U.S. at 129.

[3] The Regan Court reiterated the position it took in *Zemel* v. *Rusk,* 381 U.S. 1 (1965), that the government could prohibit travel in the face of an overriding national security threat. *Zemel* was decided shortly after the Cuban Missile Crisis, based on the government's assertions that allowing Americans to travel could endanger their lives and provoke a similar international incident if the Cuban government attacked or took Americans hostage.

[4] Letter dated June 7, 1993 from Secretary of State Christopher to Howard Berman, Chairman of the Subcommittee on International Operations ("Christopher Letter "). [A copy of this letter is attached to this testimony.]

ing the final bill noted that "[t]he committee of conference understands that it is the policy of the executive branch to now undertake to incorporate this principle through regulatory and administrative changes, including issuance of visas for these purposes, and removal of currency restrictions for such activities, in all existing and future embargoes." H. Rept. 103–482, at 239.[5]

Finally, the 1994 Act amends the TWEA and the IEEPA to correct overly narrow Treasury Department interpretations of 1988 free trade in ideas legislation which prohibited restrictions on the import or export of information and informational materials.These changes make clear that all information and informational materials are exempted from all existing and future embargoes, regardless of the type, format, or means of transmission (including electronic information). Apparently in response to this provision, the United Nations economic embargo of Haiti exempted information from its coverage. See United Nations Security Council Resolution 917 (May 6, 1994).

CURRENT RESTRICTIONS ON TRAVEL TO CUBA

For five years from 1977 to 1982, the government imposed no restrictions on the right of Americans to travel to Cuba. *See* 42 Fed. Reg. 16621 (1977); 42 Fed. Reg. 25499 (1977). This was the case despite ongoing Cold War hostilities and the maintenance of the economic embargo. In 1982, however, President Reagan reimposed the travel ban, with very limited exceptions. Even though the reasons for imposition of the 1982 ban have all disappeared, the Cuban travel ban remains in large measure unchanged. In June 1993, in response to the Cuban Democracy Act, it was slightly eased. However, six weeks ago, on August 26, 1994, it was tightened. Current restrictions are more stringent than those imposed by President Reagan.

When the current administration took office, the Cuban embargo banned travel by all Americans, except professional researchers "with an established interest in Cuba," journalists, people visiting close family relatives, and persons whose travel was hosted by Cubans. Thus, American journalists, professional researchers doing work on Cuba, and Americans visiting their family were free to travel to Cuba under a general license, meaning that they did not have to ask the U.S. government for permission to go. Of course, if individuals went to Cuba, who did not come within these categories, they would be guilty of committing a federal felony. Tourist travel was banned. In addition, since July 1993, persons could apply for special permission to go for educational purposes, to travel on behalf of human rights organizations, or for purposes of importing informational materials, or for public performances or exhibitions.

In practice, these restrictions have proved unworkable and discriminatory, as set out in more detail below. However, after passage of the congressional resolution in the Free Trade in Ideas Act, we understood that the Administration was working on changes to implement the congressional resolution and to allow all travel except tourist travel.

We were extremely disappointed on August 26, when, instead of making changes to implement the resolution, the Administration issued new regulations, tightening instead of loosening the travel restrictions. They did so, not in response to any asserted national security threat, but because record numbers of Cubans were fleeing Cuba for the United States and as part of an effort to persuade Castro to prevent more Cubans from leaving.

- The new regulations ban all family travel, except in cases of terminal illness or severe medical emergency. Even then, you have to ask and wait for U.S. government permission to visit your dying mother. Such an absurd restriction is not only a violation of the right to travel, but also of the fundamental liberty interests that protect family relations. Congress clearly intended such travel to be protected when it passed the non-binding resolution. While the congressional resolution does not explicitly refer to "family" travel, it instead refers to the broader category of travel for "humanitarian" purposes. The resolution was meant to cover all travel except tourist travel, and did not explicitly refer to "family" travel only because no one ever thought that the administration would reverse this decade old policy.
- The new regulations no longer permit travel by free-lance journalists or documentary film-makers: the general license for journalists is now restricted to

[5] However, in his April 20, 1994 signing statement, President Clinton appeared to retreat from this commitment stating that "[w]e will carefully consider the sense of the Congress as we complete our review of the standards for general and specific licenses under embargo programs. We have not, however, committed as a matter of policy to remove restrictions affecting" such travel.

those "regularly employed in that capacity by a news reporting organization" when the regulations had included a general license for "persons who are traveling for the purpose of gathering news, making news or documentary films," 31 C.F.R. G6§ 515.560 (a)(1)(ii).

- The new regulations require professional researchers to individually apply for permission to go, when they were previously free to travel under a general license.
- The new regulations no longer permit travel "for purposes of public performances, public exhibitions or similar activities", when specific licenses for such purposes have been available since last June, and travel for this purpose was specifically referred to in the congressional resolution.
- The new regulations contain no safeguards to ensure that even people coming within these limited categories will receive timely approval of their travel requests or that the Treasury Department will cease arbitrarily denying such licenses as it was doing prior to the passage of the Congressional resolution.[6]

Since August, Administration policy has been unclear. While Anthony Lake stated that "the President remains firmly committed to the free exchange of ideas and information," that commitment evidently extends only to persons who can demonstrate "genuine educational or research needs" to the satisfaction of the Treasury Department.[7] Although Lake also announced that "travel for educational or research purposes will continue to be permitted under the same standards as before" in practice that has not turned out to be the case.

Since the August tightening of restrictions, groups of academics seeking to attend academic conferences who would previously have been free to travel under the general license for professional researchers have been forced to submit extensive information about themselves and their scholarly pursuits. They needed a lawyer to obtain permission. Dan Walsh of Liberation Graphics, an importer of Cuban political posters, has been unable to get his specific license renewed, even though Treasury Department employees told him he was in full compliance and entitled to renewal of this license. Treasury Department employees have also said that while they have been directed to first process requests for permission from Cuban-Americans seeking to visit family members in emergencies, they do not have the staff to do so.

In general there is great confusion about who is entitled to go under the regulations and no written guidance from the Treasury Department. For example, while the regulations state that only persons "regularly employed * * * by a news reporting organization," travel under the general license, Treasury has informed some people that it interprets this to include free-lance journalists. As a result, Americans seeking to exercise their constitutional rights must find a lawyer to advise them whether they face jail for doing so.

Even before the August charges, the regulatory scheme had proved unworkable and discriminatory. Some persons, including a group of mathematicians who should have been entitled to a specific license for educational travel were denied licenses. The government threatened to criminally prosecute a group of travelers who were clearly entitled to a specific license for an educational trip, but chose as a matter of principle not to apply for a license. In October, 1993 and again in June, 1994, the group called the Freedom to Travel Campaign organized an educational trip to Cuba, but did not apply for a specific license because they believed the regulations to be unconstitutional. The 175 travelers on the October trip were professionals, free-lance journalists, and others with an established interest in Cuba. They came from around the country and included doctors, teachers, engineers, priests, and blue collar workers, ranging in age from 4 to 89. They spent a week in Cuba with a full-time schedule of educational, research, and journalistic activities, including visiting day care centers, health clinics, and agricultural cooperatives. They met and had extensive discussions with government officials, experts on Cuban affairs, and ordinary citizens. Upon their return, many were questioned and harassed by Customs agents. The travelers were then referred to the Department of Justice for possible criminal prosecution under the Trading with the Enemy Act and the matter has not been resolved. The group organized a second trip in June and right before the trip, the Treasury Department blocked the group's bank account on the grounds that they intended to violate the law. The group went anyway and has filed a lawsuit seeking return of their money and challenging the Cuba travel regulations. The lawsuit is now pending and the group is at this moment in Cuba on a third trip.

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[6] The new regulations also further restrict specific licenses for "activities of recognized human rights organizations" to instances "investigating human rights violations."

[7] Letter from Anthony Lake, National Security Advisor, to Audrey Chapman, American Association for the Advancement of Science, September 19, 1994, copy attached.

All of these examples illustrate the grave constitutional problems which arise under a regulatory scheme which picks and chooses which Americans may exercise their constitutional rights and then makes those rights subject to bureaucratic regulations. Indeed, as far as we can determine, the government threatened with prosecution and froze the bank account of the Freedom to Travel campaign without any high level policy review of whether the government interest at stake is the "weightiest national security interest" necessary to restrict these constitutional rights. Indicting Americans for simply exercising their First and Fifth Amendment rights would be unprecedented in recent history. Before the government even considers doing so, the Secretary of State and the Attorney General personally should determine that doing so is essential to the national security. We do not believe that determination can be made in good faith.

Moreover, a regulatory scheme such as this, which gives Treasury officials unbounded discretion to grant or deny a permit application, violates the First Amendment on that ground as well. *See* 31 C.F.R. §515.560(b) (allowing OFAC to grant licenses "in appropriate cases" without defining such cases). "[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood* v. *Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

CONCLUSION

None of the national security considerations found by the Supreme Court to justify the Cuban travel ban in 1982, apply today. Recognizing these changed circumstances, the Executive no longer attempts to justify the travel restrictions as necessary to our national defense. Instead, the restrictions are justified as helpful to the U.S. foreign policy objective of promoting democracy and human rights in Cuba.[8] The most recent tightening of the restrictions was done in response to the increased flow of refugees permitted by Cuban Premier Castro. But there is no support for the proposition that fundamental rights of Americans may legitimately be sacrificed to promote human rights in Cuba.

While our constitutional history is replete with instances in which fundamental rights have been subordinated to real or asserted threats to the national security, never have such rights been sacrificed for the reasons that now underlie the present restrictions on travel to Cuba. Although those reasons may be sufficient to prevent Americans from purchasing cigars, rum, or sugar, they are not sufficient to restrict the exchange of ideas and information via the right to travel. Moreover, we suggest that it is paradoxical at the very least to promote democracy and human rights in Cuba through a policy that limits constitutional rights here.

Congress should now act to protect the constitutional right to travel so that the Executive Branch may not sacrifice that right whenever it deems it expedient to do so.

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THE WHITE HOUSE,
*Washington, DC, September 19, 1994.*

Mrs. AUDREY CHAPMAN,
*Program Director, American Association of the Advancement of Science,*
*Washington, DC.*

DEAR MS. CHAPMAN: Thank you for your letter regarding United States policy toward Cuba. The decisions announced by the President on August 20, 1994, and subsequently implemented by the Department of the Treasury, are consistent with our long-standing goal of seeking a peaceful transition to democracy in Cuba. The careful application of sanctions is designed to pressure the Cuban government and cut off the supply of foreign currency it uses to support its failed economy.

I can assure you that the President remains firmly committed to the free exchange of ideas and information. Travel for educational or research purposes will continue to be permitted under the same standards as before. This will ensure that people with genuine educational or research needs will still be permitted to travel to Cuba.

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[8] *See* "Speech by Alexander F. Watson, Assistant Secretary of State for Inter-American Affairs before the Cuban American National Foundation" (Oct. 26, 1993) ("Human rights and democracy are two of the pillars of United States foreign policy under the Clinton administration, and are at the core of our policy towards Cuba. ").

I appreciate your concerns and assure you that the President and I share your goal of moving toward a democratic Cuba and resuming normal relations with a freely elected Cuban government.

Sincerely,

ANTHONY LAKE,
*Assistant to the President,*
*for National Security Affairs.*

Senator SIMON. Thank you very, very much.

I have just been going through your statement as you testified. I appreciate an excellent statement here.

Professor Turner?

## STATEMENT OF ROBERT F. TURNER

Mr. TURNER. Mr. Chairman, it is a great pleasure to be here with you this afternoon to discuss these important issues. Before I begin, I would like to just stress that I am here in an individual capacity and not representing the Government or the Naval War College or the University of Virginia.

I have provided a statement of some 18,000 words to the committee on this issue, tracing the history of travel restrictions and passports back to pre-Biblical times, and I am not going to even try to summarize that here. It will be in the record, I understand.

Let me just make a couple of observations of a legal nature and then make a policy observation or two.

First of all, it was not until 1958, in the case of *Kent* v. *Dulles,* that a bare majority of the Warren Court concluded there was a constitutional right to travel abroad. Upon reviewing this case, it is very clear that at least some of the historical analysis is seriously flawed. The Court misrepresented both the Magna Carta and Blackstone's commentaries, for examples, as precedents, and the case has clearly been substantially narrowed by the Supreme Court.

The current state of judicial interpretation can be summarized briefly as follows. Across-the-board area restrictions, at least when approved by Congress, such as the current prohibitions on travel to Cuba, are constitutional and do not raise problems under either the first or fifth amendment, the first amendment or due process. That would be *Regan* v. *Wald,* the most recent major Supreme Court case in the area.

Restrictions on travels by individuals may not be premised entirely upon beliefs or associations or other behavior protected by the first amendment, but otherwise, they simply require a statement of reasons and an opportunity for a post-revocation hearing, and the Supreme Court has said that the freedom to travel abroad is subordinate to national security and foreign policy considerations.

There have been a number of policy arguments made here today about the importance of the benefits of travel and I would subscribe to virtually all of those. I certainly would not be making my life now as a school teacher if I didn't believe that ideas were important or that the free flow of ideas were not beneficial.

But indeed, I think it probably is a good time to have a major reconsideration of our policy towards Cuba.

There are two issues here. One of them is what ought be our policy towards Cuba and the other is who ought to make that decision.

A substantial portion of my testimony is spent pointing out that the Founding Fathers clearly vested the primary responsibility for foreign affairs in the President. This was conveyed in article II, section 1, when they gave the President the executive power. I have included quotations from Thomas Jefferson, Madison, Hamilton, Jay, Washington, John Marshall, all of them saying that the executive power clause gives the President all powers of their nature executive and that the control of foreign policy is one of those powers.

Historically, Congress has given the President complete discretion in this area. It was not until the Cold War that Congress placed any restrictions on the President's policy in this area. I think it could be very harmful for Congress to intervene and impose its will on the President in this area, even if Congress has the right policy. What I would urge instead is to convey the policy arguments to the President and hope that he makes the right decisions.

Let me just give you three examples of how harmful this can be.

Just 11 years ago last week, the Senate on September 29, 1983, passed a bill authorizing the President to continue our troops in Beirut. In that debate, which was a very partisan and narrow debate, during that debate, the Commandant of the Marine Corps came to the Senate Foreign Relations Committee and virtually begged them to stop the divisive debate. During that debate, one member after another, including your former colleague, Senator Percy, Chairman of the Foreign Relations Committee, said if there were any further casualties, we could reconsider this vote at anytime.

About that time, we heard from the Syrians that they believed the Americans were short of breath. A few weeks later, we intercepted an intelligence communication that said if we kill 15 more Marines, the rest will go home. Then they blew up the Marine barracks and killed 241 Marines. I don't think that would have happened if they would not have interpreted Congress as saying they were going to pull the plug. I think Saddam Hussein could have been deterred.

Let me just give you one closing example, and it was a secret visit by General Vern Walters in February of 1983 to visit Castro. Walters went to see Castro and he said, look, the Reagan administration is not going to tolerate your continued intervention in Latin America. We know what you are up to. You have to stop it.

Castro listened to him for a while and then he stopped him and he said, sit down, General. I happen to know the American system very well and I happen to know that whatever Ronald Reagan or any other American wants to do to me, the American Congress will never let him touch me.

Now why did he think that? When Castro sent 40,000-some-odd troops into Angola, Congress passed a law prohibiting the President from responding. It was only years later that Congress said, gee, we goofed. Mr. President, can't you get in there and do something about Angola?

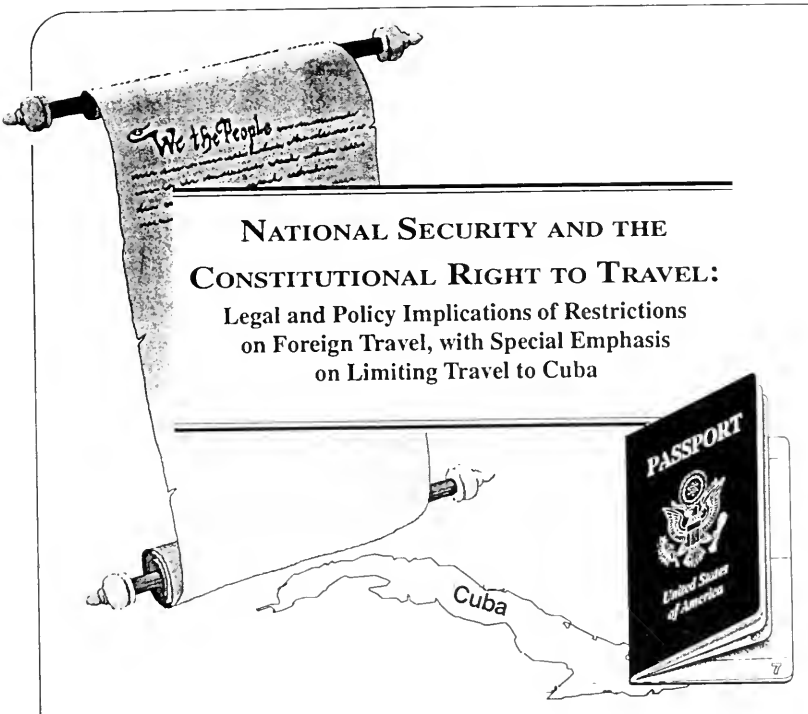
When the President was trying to stop the Nicaraguans from trying to overthrow the government of El Salvador and other governments in the region, Congress passed a series of laws blocking the

aid. Castro, of course, at the time was funneling arms through and so forth.

Right now, we are at a critical time. The travel is important. There are tremendous benefits that could come from it. But it is even more important for our President—I didn't vote for him and I won't vote for him the next time but he is the only President we are going to have—it is very important that our President be able to deal with Fidel Castro in a position of strength. If Congress over a relatively minor issue—these issues are not minor, but as compared to what Castro has been doing and getting him out of power, these are relatively peripheral issues—if Congress signals Castro that Congress is going to pull the plug on the President, we are not going to have an effective foreign policy and the people of Cuba are going to continue to suffer.

Thank you, Mr. Chairman.

[The prepared statement of Robert F. Turner follows:]




# National Security and the Constitutional Right to Travel:

## Legal and Policy Implications of Restrictions on Foreign Travel, with Special Emphasis on Limiting Travel to Cuba

Prepared Statement of

**Robert F. Turner**
**Charles H. Stockton Professor of International Law**
**U.S. Naval War College**

before the

**Subcommittee on the Constitution**
**Committee on the Judiciary**
**United States Senate**

2:00 PM
Wednesday • 5 October 1994
Dirksen Senate Office Building • Room 628

## About the Witness

ROBERT F. TURNER is currently serving a one year appointment as the Charles H. Stockton Professor of International Law at the United States Naval War College in Newport, Rhode Island. In August 1995 he will return to his position as Associate Director of the Center for National Security Law at the University of Virginia School of Law, which he cofounded in 1981 as a nonpartisan interdisciplinary institute for the advanced study of legal issues affecting the national security. After serving two Army tours of duty in South Vietnam he spent several years as a Fellow at Stanford University's Hoover Institution on War, Revolution and Peace, followed by five years as the national security adviser to a member of the Senate Committee on Foreign Relations. He has also worked in the policy cluster at the Pentagon, as Counsel to the President's Intelligence Oversight Board at the White House, as Principal Deputy Assistant Secretary of State for Legislative Affairs, and as the first President of the congressionally-established United States Institute of Peace. He is a former three-term Chairman of both the American Bar Association's Standing Committee on Law and National Security and its Committee on Legislative-Executive Relations, and currently serves as Editor of the ABA *National Security Law Report.* In addition to teaching courses on Advanced National Security Law and International Law, Professor Turner for many years taught the basic US Foreign Policy course for undergraduates in the Woodrow Wilson Department of Government and Foreign Affairs at the University of Virginia. A frequent witness on issues of constitutional and international law before congressional committees, he is the author or editor of nearly a dozen books and numerous articles. He is a member of the Council on Foreign Relations and other professional organizations.

## Disclaimer

It should be emphasized that Professor Turner is appearing in his individual capacity this afternoon and is taking a day of annual leave to avoid even the appearance that his testimony reflects the views of the Naval War College, the Department of the Navy, or the University of Virginia. The views expressed are entirely his own.

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**Prepared Statement of**

## Professor Robert F. Turner

MR. CHAIRMAN, it is an honor to be with you this afternoon to discuss these important issues of constitutional law and policy. I want to emphasize at the start that I am here today in my private capacity as a scholar and not as a spokesman for the U.S. Naval War College, any other government agency, or the University of Virginia.[1] Indeed, I have taken a day of annual leave to avoid any misunderstanding on this point.

I thought it might be helpful if I began with a brief discussion of the separation of constitutional powers in the national security realm—in part because there are important powers that have been largely overlooked in much of the contemporary discourse, and in part because, without a serious understanding of this issue, it is difficult to do justice to the more specific issues raised in this hearing.

I will then provide an overview of controls on foreign travel, including a look at historic practice, significant statutes, and the major court opinions in this area. My constitutional discussion will conclude with a brief analysis of the proper constitutional standards which should be applied to travel restrictions aimed at specific individuals and to more general bans baring travel to specified geographic areas (such as the ban on travel to Cuba); and I will also discuss the question of whether the President has independent authority that might be exercised in this area in the light of the withdrawal of some of the traditional statutory bases of authority. After a brief discussion of the "right to travel"

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[1] In this respect I would note this sentence in your letter dated September 22, 1994, inviting me to testify: "Our invitation is based on your expertise in the field of foreign relations law, and should not be construed as a request for a witness speaking on behalf of the United States Navy or the Naval War College."

under International Law, I will conclude my testimony with some observations of a policy nature—both in terms of substance and process.

## Background

The earliest reference that I have encountered to the issuance of a passport involved a 450 BC request by newly-appointed Palestine Governor Nehemiah for a document to provide safe conduct during his journey from Babylon to Palestine. The incident is recorded in the Bible in this passage:

> And I said to the king, 'If it pleases the King, let letters be given to me to the governors of the province Beyond the River, that they may let me pass through until I come to Judah.[2]

Etymologically, the term "passport" is derived from the French *passer* (to enter or leave) and *port* (a port or harbor)—and it originally referred to a document authorizing an individual to "pass through a city's gate or through the ports of the realm."[3]

The debate over whether there is a "right to travel" dates back at least to the early Thirteenth Century, and such a right was expressed in the original version of the Magna Carta issued (under duress) by King John on 15 June 1215 at Runnymede:

> 42. It is allowed henceforth to any one to go out from our kingdom, and to return, safely and securely, by land and by water, saving their fidelity to us, except in time of war for some short time, for the common good of the kingdom; excepting persons imprisoned and outlawed according to the law of the realm, and people of a land at war with us . . . .[4]

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[2] Nehemiah 2:7, *quoted in* PASSPORT OFFICE, U.S. DEP'T STATE, THE UNITED STATES PASSPORT: PAST, PRESENT, FUTURE 1 (1976).

[3] GAILLARD HUNT, THE AMERICAN PASSPORT 2 (1898); Louis L. Jaffe, *The Right to Travel: The Passport Problem*, 35 FOR. AFFS. 17 (1956); U.S. DEP'T STATE, THE UNITED STATES PASSPORT 2.

[4] A reprint and excellent discussion of this document is found in AMERICAN BAR FOUNDATION, SOURCES OF OUR LIBERTIES 11-22 (Richard L. Perry, ed. 1978).

However, this version of the great charter (called *carta libertatum*) was promptly struck down by Pope Innocent, III,[5] and the subsequent forty-seven[6] versions—including the third reissue by Henry III in 1225, which was the first to be given the name *Magna Carta* and is the one used in English statute books and cited by most legal treatises[7]—omitted any reference to the right to travel because it seemed "weighty and doubtful."[8] Thus, the fact that freedom to travel was ultimately *rejected* as a natural right in the Magna Carta may stand as evidence that no such "right" existed at that time.

In fact, the Magna Carta did not secure the "right to travel abroad" for Englishmen; in the years which followed kings and queens imposed travel constraints at will.[9] Particularly important, in terms of understanding the "rights of Englishmen"[10] as perceived by the American Founding Fathers, is this discussion in volume 1 of Blackstone's *Commentaries*:

> A natural and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without license. This may be necessary for the public service, and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no not even a criminal.[11]

Thus, the power to restrict foreign travel was viewed by British authorities at the time our Constitution was written as an *Executive* rather than a Legislative power. In this regard, it

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[5] It is clear that King John accepted the charter because he "found himself confronted by the armed barons, arrayed in a warlike host," and also that the Pope was "lord of all England." *Id.* at 3-4.

[6] The Magna Carta was reissued forty-seven times by the end of the reign of Henry V (1422). *Id.* at 23.

[7] *Id.* at 4 n.11.

[8] Jaffe, *The Right to Travel* at 19.

[9] For examples, *see id.* at 20.

[10] Much of the impetus behind the American Revolution was the desire to secure "the rights of Englishmen" for the colonies. *See generally*, A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE (1968); and 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 1760-1895 (Charles S. Hyneman & Donald S. Lutz, eds. 1983).

[11] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (book I, chapter 1) (1765).

is important to recall that Blackstone's *Commentaries* were reprinted in the colonies in 1771-72, and Edmund Burke remarked that he had been informed by a leading London bookseller that "they have sold nearly as many of Blackstone's *Commentaries* in America as in England."

When the American Constitution was written during the summer of 1787, there was a widespread view that it was unnecessary to include a "Bill of Rights" because the powers of the federal government were to be strictly limited and no "right" could be jeopardized in the absence of a clear commitment of contrary power to the government. Thus, the fact that the original Constitution did not identify such a "right" is not dispositive of the issue. During the state ratification debates it became clear that the people wanted a specific enumeration of the most fundamental rights (most of which are traceable directly to English precedents); and it is significant, but not conclusive, that the Bill of Rights does not incorporate any reference to a right to travel. This does not establish that no such right was understood to exist[12]; but, particularly when viewed in the light of the existing British Constitution, it does suggest that any such "right" was not considered to be of a fundamental nature. It should be noted, however, that in the same year (1791) that the Bill of Rights was ratified, the French Declaration of the Rights of Man affirmed the right to travel as a natural right.[13] Two years later, the "English Act of 1793" required a passport for travel by aliens in England.[14]

It needs to be kept in mind that the "right to travel" issue was not clearly tied to the issuance of "passports" during the early years of the American Republic. Prior to the Cold War, American citizens did not need a passport or other governmental authority to leave the

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[12] *See, e.g.*, U.S. CONST., Amendment 9.

[13] Jaffe, *The Right to Travel* at 19. Because this did not occur until after the American Constitution had been ratified and the Bill of Rights drafted, it can not be given significant weight as an influence upon the American understanding. Indeed, even had the Declaration of the Rights of Man been widely circulated during the American debates, its significance would be difficult to establish—one might argue that the fact that no such "right" was embodied in the American charter reflected a decision to reject the French viewpoint.

[14] U.S. DEP'T STATE, THE UNITED STATES PASSPORT 3.

country during peacetime.[15] Originally, passports were documents issued to aliens giving them special protection when traveling within the territory of the issuing State. The majority of States in the late Eighteenth Century required no special authority either for their own nationals to depart the country in time of peace or for aliens to enter and travel within the State.

The Eighteenth Century antecedent of the modern passport was a "certificate of citizenship" issued by a sovereign authority to one of its own nationals who might benefit from special treaty protections while traveling to certain destinations if such citizenship could be established. The United States issued such documents during the presidency of George Washington.[16] It also issued passports to Americans.[17]

During the Nineteenth Century some States issued "passports" to their own nationals, while other States granted similar documents to aliens; indeed, some States—including the United States—issued documents to both. Finally, by the late 1880s, the modern practice of issuing "passports" to nationals and using *visas* to authorize travel by foreigners began.[18]

The U.S. Government issued "passports" even before the Constitution was drafted. Under the Articles of Confederation, there was no federal "executive" and all power was vested in the Continental Congress. This produced a variety of widely-recognized ills, few as important as the tendency of Congress to become bogged down in the details of foreign policy execution and the conduct of war. In a similar way, most of the colonies established governments in which the legislatures were supreme—most governors were appointed by the legislatures and the most fundamental principles of separation of powers were ignored.

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[15] HUNT, THE AMERICAN PASSPORT 3-4. Because of this, trying to resolve the current controversy on the basis of "original intent" is a more difficult task.
[16] 3 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 856 (1906).
[17] Reproductions of early U.S. passports dating back to the presidency of George Washington can be found in HUNT, THE AMERICAN PASSPORT; and THE UNITED STATES PASSPORT.
[18] U.S. DEP'T STATE, THE UNITED STATES PASSPORT 4.

To improve the management of foreign affairs, in 1781 the Congress created a "Department of Foreign Affairs"—to be headed by a "Secretary"—and in 1782 he was given the duty, *inter alia,* to "reduce to form all . . . passports . . . ."[19] In reality, however, Congress continued to "meddle" with the business of foreign intercourse (leaking secrets in the process[20])—to the deep consternation of people like General George Washington and Secretary of Foreign Affairs John Jay. This had a major influence on the allocation of powers at the Philadelphia Convention, and without digressing too much it may be useful to recall the decision that was made.

## The Constitutional Separation of Foreign Affairs/National Security Powers

From the early days of the administration of George Washington the consistent practice has been for the President to control the nation's foreign policy, subject to very important constitutional "checks" in the form of Senate vetoes over treaties and diplomatic appointments, a legislative power over the decision to initiate a war (but not to respond ***defensively*** to foreign aggression), and the need for appropriations. Throughout our history, the most fundamental declarations of policy—such as the 1823 Monroe Doctrine and the 1947 Truman Doctrine—were proclaimed to the world without any formal congressional participation and often without even minimal consultation.[21]

Even advocates of congressional dominance in the foreign policy realm like my friend Professor Harold Koh, of Yale Law School, acknowledge that from the beginning the early presidents dominated in the foreign affairs realm; but they often attribute this to a

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[19] *Id.* at 9.
[20] *See* Robert F. Turner, "Secret Funding and the 'Statement and Account' Clause," prepared statement delivered to the House Permanent Select Committee on Intelligence, 23 February 1994 (soon to be printed).
[21] *See, e.g.*, CECIL CRABB, THE DOCTRINES OF AMERICAN FOREIGN POLICY.

constitutional aberration caused by the tremendous esteem in which Washington was held by the nation.[22] They study the Constitution in vain to find any textual grant of foreign affairs power to the Executive. Indeed, in the wake of the Vietnam tragedy, the idea that Congress was intended to dominate in the foreign affairs/national security field has grown to the point of becoming almost a conventional wisdom.

In reality, the separation of powers is—with some important "gray areas"—relatively clear if you understand the words used in the constitutional text as they were understood by educated Americans in 1787. The key clause, often totally overlooked in contemporary efforts to explain the separation of foreign affairs powers, is Article II, section 1, which provides that "The executive Power shall be vested in a President of the United States of America."

Note that it does not say "All [executive] Powers *herein granted* shall be vested" in the President. That is the construction used in article I, section 1, establishing the constitutional powers of Congress, which also explains why it was necessary to spell out a detailed list of congressional powers in the first article without including a comprehensive list in article II.

The Founding Fathers were familiar with the writings of John Locke, Montesquieu, William Blackstone, and other writers about separation of powers of the era—all of whom placed the control of foreign intercourse in the hands of the Executive. They used different terms—Locke called it the *federative* power, for example; but, like the others, he argued that it involved matters which could not effectively be regulated by legislative bodies. Locke explained:

> [T]he management of the security and interest of the publick without, . . . . though . . . in the well or ill management of it be of great moment to the commonwealth, yet it is *much less capable to be directed by antecedent, standing, positive Laws*, that [by] the Executive; and so must necessarily be

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[22] This argument is made, *inter alia*, in Professor Koh's *The National Security Constitution*.

> left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. [Emphasis added.][23]

Montesquieu divided the powers of the executive into "the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."[24] Blackstone—who, as already noted, was greatly admired in the American colonies and whose *Commentaries* sold extremely well in America in the years before the Philadelphia convention—argued that "With regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation . . . ."[25]

I recognize that this is not primarily a hearing about the separation of foreign affairs powers, but an understanding of that issue is essential to a serious analysis of the important issues you are addressing. Any discussion of the "executive Power" clause would be incomplete without a reference to the great debate of 1789, when the House of Representatives was establishing a Department of Foreign Affairs (later to be redesignated "Department of State") and the issue arose of what authority would be required to remove a cabinet officer. The Constitution was not clear on the subject, and a variety of views were expressed. Some thought an appointment would bring life tenure during good behavior, while others argued that the Senate would have to approve any decision to dismiss such an officer. James Madison argued that the President should be free to dismiss members of his cabinet despite the fact that the Constitution required Senate "advice and consent" to their appointment, reasoning:

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[23] JOHN LOCKE, SECOND TREATIES ON CIVIL GOVERNMENT § 147, *excerpted in* Robert F. Turner, *The Constitutional Framework for the Division of National Security Powers Between Congress, the President, and the Courts*, in JOHN NORTON MOORE, FREDERICK S. TIPSON, & ROBERT F. TURNER, NATIONAL SECURITY LAW 749, 750 (1990).

[24] *Reprinted in* Robert F. Turner, *The Constitutional Framework for the Division of National Security Powers Between Congress, the President, and the Courts*, in JOHN NORTON MOORE, FREDERICK S. TIPSON, & ROBERT F. TURNER, NATIONAL SECURITY LAW 749, 752 (1990). (I have cited this source rather than the originals both because it is quicker and I am writing under time pressure, and because this is a convenient collection of the relevant materials on this issue which I thought might be of interest.)

[25] *Id.* at 755.

> The doctrine . . . which seems to stand most in opposition to the principles I contend for, is, that the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment. I agree that if nothing more was said in the Constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be a great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the Constitution no less explicit . . . ; it is that part which declares that *the Executive power shall be vested in a President of the United States.* The association of the Senate with the president in exercising that particular function, is an exception to this general rule; and *exceptions to general rules, I conceive, are ever to be taken strictly.*"[26]

Madison's view carried the day in both the House and the Senate.

Early the following year, a question arose within the Executive branch as to where the Constitution had vested the details of the foreign policy business. It was clear that the President was to "nominate" and "appoint" ambassadors and other diplomats, but who was to decide where diplomatic missions should be sent, the appropriate grade for each mission, and similar details. Not surprisingly, knowing that his decision might set a precedent, Washington sought out the advice of his closest advisers. In response, on April 24, 1790, Jefferson wrote in a carefully drafted legal opinion prepared for President Washington:

> **The Constitution** has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of representatives; it **has declared that 'the Executive powers shall be vested in the President,' submitting only special articles of it to a negative by the Senate**; and it has vested the Judiciary power in the courts of justice, with certain exceptions also in favor of the Senate.
>
> **The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, *except* as to such portions of it as are specially submitted to the Senate.** *Exceptions* are to be construed strictly. [Bold emphasis added.][27]

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[26] 1 ANNALS OF CONG. 496-97 (1789)(emphasis added).

[27] 16 THE PAPERS OF THOMAS JEFFERSON 378-79 (J. Boyd, ed. 1961) (emphasis in original).

Lest there be any confusion about how limited the role of the Senate was perceived to be in foreign affairs, it is useful to examine Jefferson's 1790 memorandum more carefully:

> The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them; nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President. They are only to see that no unfit person be employed.[28]

A few days after receiving this memorandum, Washington made this entry into his *Diary*:

> Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay's and Mr. Jefferson's—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no further than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.[29]

An identical constitutional interpretation was embraced by Jefferson's chief rival of the era, Alexander Hamilton, who wrote in 1793:

> It deserves to be remarked, that as the participation of the Senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.
>
> While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War—it belongs to the "Executive Power" to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the U[nited] States with foreign Powers. [30]

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[28] *Id.* at 379.
[29] *Quoted in* 16 *id.* n.
[30] *Reprinted in* NATIONAL SECURITY LAW 762.

Another Jefferson rival, Federalist John Marshall, used similar reasoning in 1800, while a member of the House of Representatives, to argue that President Adams was empowered to "execute" an extradition provision of the Jay Treaty with Great Britain. He reasoned at the end of the month-long debate over the so-called "Jonathan Robins Affair":

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.[31]

The Republicans were trying to make the Robins Affair a major issue in the election of 1800, and Jefferson's close friend, Representative Albert Gallatin, was scheduled to make the closing Republican presentation in this major debate. As Marshall concluded what has been widely hailed as a brilliant speech, Gallatin turned to his allies, tossed his own prepared text on the table, said words to the effect of "You answer him, as for me I find his arguments unanswerable," and sat down. Marshall's view carried the day, and even Jefferson subsequently grudgingly acknowledged the brilliance of Marshall's presentation.

When members of the Constitutional Convention served in the early congresses, they established a strong practice of deference to the President in foreign affairs. For example, when the Department of Foreign Affairs was established in the First Congress the Secretary was charged simply with carrying out the directions of the President[32]—in sharp contrast to the Secretary of the Treasury, who was required to make regular reports to Congress.

Similarly, when funds were first appropriated for foreign affairs, the statute provided that:

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[31] 10 ANNALS OF CONG. 613-14 (1800).
[32] 1 Stat. 28 (1789).

> [T]he President shall account *specifically* for all such expenditures of the said money *as in his judgment* may be made public, and also for the *amount* of such expenditures *as he may think it advisable* not to specify.[33]

The uniform practice in appropriating funds for foreign affairs during the first fifteen years under the new Constitution was summarized by Jefferson in a letter to then-Treasury Secretary Gallatin in 1804:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties . . . . [I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the president.[34]

When the Senate first established a standing Committee on Foreign Relations in 1816, one of its first reports stated:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and . . . . [f]or his conduct he is responsible to the Constitution. . . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.[35]

The historical record is really quite clear.[36] The reason the President controlled American foreign relations throughout our first 180 years was not a result of some fluke caused by excessive admiration for George Washington—the Constitution was designed that way. As Professor Quincy Wright—former President of both the American Political Science Association and the American Society of International Law—observed in 1922: "when the constitutional convention gave 'executive power' to the President, the foreign

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[33] *Id.* at 129 (1790)(emphasis added).

[34] 11 WRITINGS OF THOMAS JEFFERSON (Mem. ed.) at 5, 9, 10.

[35] *Quoted in* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 441 n.114.

[36] This is not to say there were not dissenters or differences of viewpoint; but my research reveals a remarkable consensus on this point.

relations power was the essential element of the grant . . . ."[37] Similarly, Professor Louis Henkin, of Columbia Law School, has observed that "[t]he executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[38]

The key to the separation of foreign affairs powers, therefore, is to understand the intentions of the Founding Fathers in vesting the nation's "executive" power in the President. Why they chose to do so is also clear. Briefly summarized, they understood that legislative bodies lacked the institutional competence to conduct foreign affairs effectively. Foreign affairs required for its effective execution such qualities as unity of design, speed and dispatch, and secrecy—none of which were characteristics of legislative bodies.

Not only had they learned this lesson from the writings of Locke and other theorists, but they had first-hand experience from watching the Continental Congress attempt to manage the Revolutionary War. The almost universally recognized shortcomings of this effort prompted John Jay, in *Federalist* No. 64, to argue that the Constitution "would have been inexcusably defective" if no attention had been paid to the "want of secrecy and dispatch" that America "heretofore suffered" under the previous system. Hamilton echoed this theme of institutional competency, *inter alia*, in *Federalist* No 70.

Jay noted in *Federalist* No. 64 that important foreign intelligence sources would not provide information to the United States if they thought it would be shared with the Senate, much less the more numerous House of Representatives; and he explained that, under the new Constitution, the President would be left "free to manage the business of intelligence as prudence might suggest."

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[37] QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 147 (1922).
[38] Louis Henkin, *Foreign Affairs and the Constitution*, 66(2) FOREIGN AFFAIRS 43 (Winter 1987-88).

Mr. Chairman, I apologize for digressing at such length on this issue; but I believe an understanding of the separation of national security constitutional powers is essential to understanding the issue of the President's proper role in restricting foreign travel.

## Two Centuries of Constitutional Practice

It should be kept in mind that a passport issued to an American citizen was, in its essence, a written communication directed to foreign governments which identified the bearer as an American citizen and asked that he be allowed to pass freely and not be molested. The standard language was quoted by the Supreme Court in 1835:

> *United States of America*
>
> To all to whom these presents shall come, greetings. I, the undersigned, secretary of state of the United States of America, hereby request all whom it may concern, to permit safely and freely to pass, _____, a citizen of the United States, and in case of need, to give him all lawful aid and protection. Given under my hand, and the impression of the seal of the department of state, at the city of Washington, the ___ day of _____, 18__, in the _____ year of the independence of these United States.
>
> [Secretary of State][39]

As a diplomatic communication, it was apparently viewed by all concerned as within the constitutional province of the President and a discretionary duty appropriate to the Secretary of State. Thus, no "delegation of authority" was felt necessary by Congress; and when Congress finally did address the issue its actions reflected the discretion considered appropriate in dealing with the Executive Branch in this area.

The first statute pertaining to passports applied only to those issued to foreigners. Early in the first session of the First Congress, an Act was approved "providing for the

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[39] Patterned after language found in *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835).

imprisonment and fine of any person violating a safe-conduct or passport 'duly obtained and issued under the authority of the United States.'"[40]

Another early statute dealing with passports was also of a criminal nature. In 1803, Congress established a one thousand dollar fine for any American consular official who "knowingly issue[d] a passport or other paper to an alien, certifying him to be a citizen of the United States . . . ."[41] Clearly, neither of these interfered with the foreign relations power of the President or the discretion of the Secretary of State to issue passports to legitimate U.S. citizens.

The War of 1812 brought the first statutory constraints on foreign travel by American citizens. A new law made it illegal for Americans to cross into enemy territory (including entering enemy camps within the United States) "without a passport" obtained from the Secretary of State or other official designated by the President.[42] But it did not place any constraints upon the Secretary in issuing such documents, and there was still no statutory basis for the issuance of passports by the Executive. The clear basis for the Act—like the two that had proceeded it—was that only Congress can attach criminal consequences to the conduct of American citizens.

The Supreme Court first addressed the issue of passports in 1835, in the case of *Urtetiqui v. D'Arcy*, where the issue was the evidentiary value of a passport in establishing U.S. citizenship. This resulted in the following discussion of the nature of American passports:

> *There is no law of the United States, in any manner regulating the issuing of passports*, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as a matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is *entirely discretionary* with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial

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40 HUNT, THE AMERICAN PASSPORT 36.
41 3 MOORE, DIGEST OF INTERNATIONAL LAW 867. This statute is discussed in *Kent v. Dulles*, 357 U.S. 116 at 122 (1958); and in *Haig v. Agee*, 453 U.S. 280 at 294 (1981).
42 3 Stat. 199 (1815).

> inquiry. It is a document, which, from its nature and object, is *addressed to foreign powers*; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a *political* document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. [Emphasis added.][43]

The prevailing view at the time appears to have been that the issuance of passports was an exclusive Executive responsibility under the Constitution—one of the "political" powers of which Chief Justice John Marshall said in *Marbury v. Madison* that "the decision of the executive is conclusive."[44]

Throughout the first half of the Nineteenth Century it was not uncommon for state governors, local officials, and even notaries to issue authentic looking documents styled as passports. At best, this was an inconvenience for the Secretary of State—and Secretary Hamilton Fish wrote various letters complaining of the practice.[45]

While I have not personally researched the issue, there is an implication in the writings of one of my predecessors as Stockton Professor of International Law—the legendary John Bassett Moore[46]—that the first Passport Act[47] was enacted simply to rectify this problem (presumably at the request of the Executive). Whatever the explanation, in August of 1856 Congress passed a law which provided in part:

> [T]he Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States.[48]

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[43] 34 U.S. at 699.

[44] "By the constitution . . . the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. . . ." "They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive." "[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165-66 (1803).

[45] *See, e.g.*, 3 MOORE, DIGEST OF INTERNATIONAL LAW 863.

[46] *Id.* 683-84.

[47] 11 Stat. 60 (1856).

[48] *Quoted in* 3 MOORE, DIGEST OF INTERNATIONAL LAW 864.

More importantly—as the above-quoted language neither authorized anything that had not been done for more than half-a-century nor placed any restrictions upon such activities—the 1856 Act prohibited under criminal penalty "any person acting, or claiming to act, in any office or capacity, under the United States or any of the States of the United States, who shall not be lawfully authorized to do [so]," to "grant, issue, or verify any passport or other instrument in the nature of a passport, to or for any citizen of the United States, or to or for any person claiming to be or designated as such, in such passport or verification."[49]

There apparently exists some misunderstanding about the nature of this first passport act. For example, a 1985 *William and Mary Law Review* article, coauthored by the Legal Director of the American Civil Liberties Union and the Staff Counsel to the New York Civil Liberties Union, asserted that "the Passport Act of 1856 . . . *delegated* power to grant passports to the Secretary of State." (Emphasis added.)[50] A review of the *Congressional Globe* debates on this bill indicates quite clearly that the legislators shared the view that the management of the nation's external intercourse was already vested in the President by the Constitution. Indeed, an earlier bill which had attempted to limit the President's discretion in other areas of diplomacy had been ignored by the President, and on 28 July 1856 the Chairman of the Senate Foreign Relations Committee made this statement on the Senate floor:

> Mr. President, in a very few words I will state to the Senate the object of this bill. At the last session of Congress a law was passed of a very voluminous character, embracing both the consular and diplomatic services. One of the features of that law was in the nature of a mandate on the President, prescribing the grade of our foreign ministers, and affixing to those grades thus prescribed an appropriate salary.
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> The Executive, very properly, I think, declined complying with the terms of the law, because it trenched on the executive trust. The President

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[49] *Id.*

[50] Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 734 (1985).

necessarily must be the sole judge of the grades of our foreign ministers. . .
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> The principal object, therefore, of this bill is, leaving it discretionary with the President, as to the grade of ministers abroad, to affix to each of those grades, when appointed, an appropriate salary . . . .
> [The Bill has been] carefully worded with a view to leave, as it was the intention of the bill to leave, all that pertains to the diplomatic service of the country . . . exclusively to the Executive, where we consider the Constitution has placed it.
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> Our foreign ministers . . . are . . . of necessity the organs of the Executive. The Constitution of the United States has lodged with the President the executive power, without undertaking to define what the executive power is. Careful and jealous as it has been in every other grant of power—careful to measure out power to the Legislature—in giving to the President the authority that is intended to be given to him, it is simply spoken of as the executive power. Now, as we consider it, a part of executive power is supreme control, free from the intervention of legislation, over the diplomatic service. . . . As we understand—certainly as I understand—that is a matter which is not within legislative control, because it pertains to the diplomatic service. These are the immediate organs of the Executive, and must remain so, subject to his control, and subject to his instruction and to the discretion of his instructions without intervention from any quarter. . . .
>
> I mean to say exactly what I have said, that the whole executive power by the Constitution is lodged in the President; that the diplomatic service, in our foreign intercourse, I understand to be necessarily a part of the executive power; and that, if Congress undertakes to prescribe minutely what the minister shall do, or what he shall not do, abroad . . . it trenches on the executive power. The President may find it, and doubtless has found it, important and desirable, in the conduct of our foreign intercourse from time to time, to use some portion of the fund, which is always placed at the control of the Executive for contingent expenses of foreign intercourse, to enable a minister to perform acts which, if we could legislate on the subject, he would be forbidden from doing by law.[51]

To argue in this context that Congress thought it was "delegating" power over passports to the Executive simply is not credible.

Discussing the 1856 passport statute more than a century later, the Supreme Court stated:

> This broad and permissive language worked no change in the power of the Executive to issue passports; nor was it intended to do so. The Act was passed to centralize passport authority in the Federal Government and specifically in the Secretary of State. In all other respects, the 1856 Act "merely confirmed an authority already possessed and exercised by the

[51] 39 CONG. GLOBE 1797-98 (1856).

> Secretary of State. This authority was ancillary to his broader authority to protect American citizens in foreign countries and was necessarily incident to his general authority to conduct the foreign affairs of the United States under the Chief Executive."[52]

Following the outbreak of the Civil War, on 19 August 1861 the Secretary of State—without specific statutory authorization—issued a regulation providing that no person was allowed to go abroad or to enter the United States without a passport—issued or countersigned by the Secretary of State in the case of Americans, issued by their own government and countersigned by an American minister or consul in the case of foreigners.[53] Congress did enact a statute in early 1863 pertaining to the issuance of passports to aliens who had declared an intention to become citizens and posted a bond conditioned for the performance of military duty,"[54] but control over aliens and naturalization is vested in Congress by the Constitution.[55] Additional State Department regulations and presidential directives were issued in 1864 requiring passports for citizens and foreign nationals during the war.[56]

Congress made some relatively minor changes to the passport laws in 1902[57] and in 1907 prohibited Americans from leaving the country during wartime.[58] During World War I the Secretary of State added the additional requirement in 1917 that aliens wishing to visit the United States obtain visas,[59] and the following year Congress enacted the Trading With the Enemy Act (TWEA)—which will be discussed *infra*[60]—and made it unlawful for

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52 *Haig v. Agee*, 453 U.S. 280, 294-95 (1981). The internal quote is from a 1960 congressional report.
53 3 MOORE, DIGEST OF INTERNATIONAL LAW 1015.
54 *Id.* at 1018-19.
55 U.S. CONST., art. 1, sec. 8, cl. 4.
56 3 MOORE, DIGEST OF INTERNATIONAL LAW 1019.
57 *See, e.g.*, 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1193 (2d rev. ed., 1945); 3 MOORE, DIGEST OF INTERNATIONAL LAW 864.
58 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 269 (1942).
59 2 HYDE, INTERNATIONAL LAW 1204.
60 *See infra*, text accompanying notes __ - __.

a citizen to leave or enter the United States during wartime without a valid passport from the Secretary of State if the President had proclaimed a state of emergency.[61]

Again, however, the traditional discretion to the Executive was apparent. The passport requirement included the language "except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe . . . ."[62] Discussing this statute, the Supreme Court has observed:

> By enactment of the first travel control statute in 1918, Congress made clear its expectation that the Executive would curtail or prevent international travel by American citizens if it was contrary to the national security. The legislative history reveals that the principal reason for the 1918 statute was fear that "renegade Americans" would travel abroad and engage in "transference of important military information" to persons not entitled to it. The 1918 statute left the power to make exceptions exclusively in the hands of the Executive, without articulating specific standards.[63]

Congress reenacted the basic Passport Act in 1926, providing in part:

> The Secretary of State *may* grant and issue passports . . . *under such rules as the President shall designate and prescribe* for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. [Emphasis added.][64]

Again, this is consistent with historic practice dating back to the founding of the Republic. In discussing this act, the Supreme Court stated in 1958:

> Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is a "discretionary act" on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said.[65]

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[61] 40 Stat. 559 (1918).
[62] *Id.*
[63] *Haig v. Agee*, 453 U.S. at 296-97.
[64] 44 Stat. 887, 22 U.S.C. § 211a, *quoted in* 8 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 259 (1967).
[65] *Kent v. Dulles*, 357 U.S. 116 at 124-25 (footnotes omitted). *See also*, Jaffe, *The Right to Travel* at 23

The Supreme Court first placed a restriction in the passport area in the 1939 case of *Perkins v. Elg*, which involved a challenge by an individual claiming American citizenship to a decision by the Secretary of State denying her a passport on the specific grounds that she had forfeited her American citizenship. The Court concluded that Miss Elg was a natural born citizen who had not lost her citizenship, and while it permitted a decree to issue including the Secretary of State along with other named defendants, it clarified:

> The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.[66]

In the exercise of that discretion, secretaries of state have over the years denied individuals passports for numerous reasons, including attempting to disturb U.S. relations with foreign governments[67] and participating in foreign politics or joining foreign armies.[68] Area restrictions were also often placed on passports to prevent Americans from traveling into war zones or other areas where their safety might be jeopardized (and the President might be required to rescue them).[69]

Indeed, even Members of Congress have been denied passports by secretaries of state when their planned travel conflicted with foreign policy goals. Consider, for example, this excerpt from the *New York Times* of 11 April 1948:

## Passports Again An Issue

**Special to the New York Times**

WASHINGTON, April 10—Representative Leo Isacson of the American Labor party ran into a little known principle of international law

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[66] *Perkins v. Elg*, 307 U.S. 325, 350 (1939).
[67] *See, e.g.*, 2 HYDE, INTERNATIONAL LAW 1195.
[68] *Id.* at 1197.
[69] *Id.* at 1207.

> this week when the State Department refused to grant the New Yorker a passport to attend a Paris conference to aid the Greek guerrilla forces.
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> This principle says that the holding of a passport is a privilege, not an inherent civil right. The Secretary of State, under legal and traditional authority, may or may not grant a passport to a citizen to travel abroad. He has had that authority since the founding of the republic. . . .
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> This power is a necessary concomitant of the Secretary's mandate to conduct and be responsible for foreign policy. When an American citizen produces his passport in a foreign country, the document says, in essence, that the foreign government should accord him recognition as an American citizen, and it serves notice that the United States Government will come to the traveler's protection.
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> Because of that guarantee, both the law and the State Department argue that it is not mandatory to grant a passport to a citizen who might embarrass this country or undertake activities not consistent with the public interest.[70]

This decision was quoted, with apparent approval, by the Supreme Court in a 1981 decision.[71] The "public interest" consideration, presumably, was that the so-called "Greek guerrillas" were being supported by various communist countries and the previous year President Truman had announced what must be regarded as among the two or three most important U.S. foreign policy doctrines of American history (the Truman Doctrine). For a Member of Congress—even a radical who wound up serving less than a year in that body—to go abroad and speak in opposition to that policy could encourage international aggressors, undermine their victims, and promote international confusion about the policies of the United States Government across the spectrum of American diplomatic relations.

### The Cold War Era

Something of a revolution in the jurisprudence of passport matters occurred as a direct consequence of the Cold War. For what it is worth, Congress clearly took the lead on this issue. Indeed, Secretary of State Dean Acheson was a frequent target of criticism by the House Committee on Un-American Activities, Senator Joseph McCarthy, and others

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[70] *Passports Again An Issue*, N. Y. TIMES, 11 Apr 1948, at E9.
[71] *Haig v. Agee*, 453 U.S. at 302.

within the Congress who felt that the State Department was too "soft" on American Communists.

Round one may arguably be traced to a congressional finding in the Internal Security Act of 1950[72]:

> That there exists a world-wide Communist revolutionary movement, the purpose of which is by treachery, deceit, espionage, and sabotage to establish a Communist totalitarian dictatorship in countries throughout the world; [and] that . . . the travel of Communist members, representatives, and agents from country to country is a prerequisite for the carrying on of activities to further the purpose of this revolutionary movement . . . .[73]

In a 1952 Press Release, the Department of State explained that:

> [I]n view of the findings by the court and the Congress, it would be inappropriate and inconsistent for the Department to issue a passport to a person if information in its files gave reason to believe that he is knowingly a member of a Communist organization or that his conduct abroad is likely to be contrary to the best interests of the United States. This policy has been followed since February 1951, and, in view of the national emergency proclaimed by President Truman and the conditions existing in various areas of the world, it is believed that it should be closely adhered to.[74]

The following month, Congress enacted the Immigration and Nationality Act which in Section 1185 required both citizens and aliens to have a passport to depart or enter the United States. The restrictions on American citizens provided:

> Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.[75]

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[72] 64 Stat. 987, 50 U.S.C. § 781 *et seq.*

[73] *Quoted in* Department of State Press Release, 24 May 1952, in *Department Policy on Issuance of Passports*, 26 DEP'T STATE BULL. 919 (1952).

[74] *Id.*

[75] Immigration and Nationality Act, 8 U.S.C. § 1185 (b), 66 Stat. 190 (1952).

Note again the clear deference given to the President in this area. Since 1952 it has been illegal for American citizens to travel (with some exception granted for travel within the Western Hemisphere) without a passport.

### *Kent v. Dulles*: The Warren Court Creates a "Right to Travel"

When Los Angeles Communist Rockwell Kent sought a passport to visit London to attend a meeting of the "World Council of Peace" (which we now know was, in fact, a Moscow-supported "front" organization), Secretary of State Dulles turned down his application pursuant to established departmental policy regarding Communists. Kent brought suit, asserting that his constitutional rights had been violated; and by a narrow 5-4 decision in the case of *Kent v. Dulles*,[76] the Warren Court agreed. The Court acknowledged the complete discretion which American Secretaries of State had exercised since the founding of the Nation over passports, but observed correctly that, with a few wartime exceptions, "until . . . quite recently . . . a passport, though a great convenience in foreign travel, was not a legal requirement for leaving or entering the United States."[77]

The Court recognized the well-established precedent of discretion by the Secretary of State, and found objectionable not the existence of broad discretion but "the manner in which the Secretary's discretion was exercised" in this case.[78] Relying upon some rather careless historical scholarship,[79] the Court majority concluded that "The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law

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[76] 357 U.S. 116 (1958).
[77] *Id.* at 121.
[78] *Id.* at 124.
[79] To mention just two examples (both based upon the Court's footnote 12): (1) the Court cited secondary sources in asserting that the Magna Carta had recognized such a right (as shown above, the "right to travel" was *deleted* from the text before the actual "Magna Carta" was issued because it was considered a "dubious" right, and British practice shows a long history of Executive constraints on foreign travel; and (2) the Court added to this footnote a citation (giving the wrong page numbers) to volume 1 of Blackstone's *Commentaries*—when in fact, as shown above, Blackstone supported the contrary position. The dissenting justices point out various other errors in the majority's account of history. *See* 357 U.S. at 139-40.

under the Fifth Amendment."[80] "If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."[81] Finding no clear grant of legislative approval for the passport restrictions (the conditions precedent for the passport prohibitions contained in the 1950 Internal Security Act to become operative had "not yet materialized"[82]), the Court struck down the Secretary's actions. In so doing, it observed that "If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case."[83]

Aside from the narrowness of the vote—and, as will be discussed *infra*, the fact that the case was subsequently narrowed in other cases—it is worth noting that Justice Douglas did not conclude that the "liberty" to travel could not be limited by the Government. He simply concluded that restricting the rights of individuals required legislative sanction.[84]

To conclude that the majority opinion by Justice Douglas in *Kent v. Dulles* was not an exemplary work of jurisprudential analysis probably understates the case; but that does not necessarily mean that the outcome was wrong. One might have reached a quite similar result—without having to carve a new constitutional right out of careless scholarship[85]—by applying an "unconstitutional conditions" analysis and holding that the Secretary of State may not exercise the clear constitutional discretion vested in him (either by the President or by Congress) in a manner contrary to the other provisions of the Constitution. Just as the Court in *Elg* in 1939 had precluded the Secretary from denying a passport on the sole ground that he concluded the woman was no longer a U.S. citizen, the *Kent* Court might have barred denying a passport solely on the basis of constitutionally-protected beliefs or associations. But the Warren Court was not noted for shying away from

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[80] 357 U.S. at 125.
[81] Id. at 129.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 127.
[85] *See supra*, note __.

enunciating new constitutional doctrines, and in *Kent* it created a constitutional right to travel.

A little more than a year later, another dispute arose involving a request by a Member of Congress to travel abroad. Representative Charles O. Porter sought a passport to travel to the People's Republic of China "in his capacity as a Congressman to seek information in connection with legislative duties."[86] (His proposed trip was not authorized by the Congress or any committee or subcommittee thereof.) Secretary of State Christian Herter denied permission for the trip on the grounds that visit by an American Government official might be interpreted as a change in the U.S. position toward the Chinese regime, and—in the wake of the *Kent* case—Porter brought suit. (After all, even Communists were being granted passports; and Mr. Porter was a United States Representative.)

The District Court granted summary judgment for the Secretary of State, and on appeal the D.C. Circuit affirmed in a *per curium* decision, saying in the process:

> Although he is a member of Congress, that status alone does not entitle him to be exempted from regulations or orders of the Executive Department in matters within the latter's constitutional competence. We do not have before us a conflict between the legislative and executive branches of the Government in the course of which the respective branches assert and seek to apply opposing constitutional claims. The issue here is merely between a claim of an inherent right asserted in his individual capacity by a member of the legislative branch, and the plenary power of the executive branch asserted by it in relation to and in its conduct of the Nation's foreign affairs. Under such circumstances the individual Congressman must conform to the regulations pertaining to passports which apply to all citizens and which have been authorized by the branch of the Government having jurisdiction over the subject.[87]

The Supreme Court denied certiorari.[88]

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[86] 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW 278.
[87] *Porter v. Herter*, 278 F.2d. 280, 282 (1960).
[88] 361 U.S. 918 (1959), 364 U.S. 837 (1960).

## The Cuban Embargo

Mr. Chairman, I understand from conversations with staff that at least part of the impetus behind this hearing is the issue of restrictions on travel to Cuba. As you know, Fidel Castro seized power in 1959 and immediately set up training camps for Latin American revolutionaries as part of a systematic effort to undermine and overthrow numerous other governments in the region. I could detail these events in some specificity, but—whatever the disagreements about the nature of his activities Americans might have had in the 1960s—I have a sense that there is a sufficiently strong body of evidence today that the Subcommittee can take legislative notice of the fact at this point.[89]

In large part because of Castro's role in trying to undermine other countries (and also because of his nationalization of the property of American citizens), on 3 January 1961 the United States broke diplomatic relations with Cuba; and thirteen days later the State Department issued regulations removing the exemption for travel to Cuba from the general statutory requirement that Americans obtain passports before traveling abroad. At the same time, the new regulations invalidated all U.S. passports for travel to Cuba without a special endorsement from the Secretary of State.[90] Congress subsequently attached language to the Foreign Assistance Act of 1961 authorizing the President "to establish and maintain a total embargo upon all trade between the United States and Cuba."[91]

The Organization of American States also reacted firmly to Castro's unlawful intervention in other States. In preparation for this afternoon's testimony, I contacted the Secretariat for Legal Affairs at the OAS and requested copies of any relevant OAS resolutions which will still in effect. Among the stack of materials I received in response to

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[89] I have spent many years studying and writing about Communist revolutionary strategy, including two years as Associate Editor of the Hoover Institution's *Yearbook on International Communist Affairs* and my 500-page study *Vietnamese Communism: Its Origins and Development* (1975). With specific respect to Castro's Cuba, *see also* ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS, Chapter 2 (1987).

[90] 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW 279-80.

[91] 22 U.S.C. § 2370(a).

my request was a copy of Resolution III adopted at the Twelfth Meeting of Consultations of Ministers of Foreign Affairs, which provided in part:

> WHEREAS
> . . . .
> Respect for and observance of human rights constitute a basic universal and inter-American juridical principle essential to the hemisphere's effective security . . . .
> The Twelfth Meeting of Consultation of Ministers of Foreign Affairs RESOLVES:
> 1. To condemn emphatically the present Government of Cuba for its repeated acts of aggression and intervention . . . .
> 5. To recommend to the governments of the member states of the Organization of American States that they apply strictly the recommendations contained in the First Report of the Special Committee to Study Resolutions . . . *as well as to the strengthening of controls on travel to and from Cuba* . . . . [Emphasis added.][92]

To be sure, some of the circumstances which led to those sanctions may no longer be present; but the OAS has not seen fit to repeal the sanctions and—consistent with other provisions of our Constitution—the President has a constitutional duty to see this treaty obligation "faithfully executed."

### *Aptheker v. Secretary of State*

In 1964, by a vote of 6-3, the Supreme Court struck down section 6 of the Subversive Activities Control Act of 1950—which made it unlawful for a member of a "communist organization" to apply for or use a passport—on the grounds that it "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment."[93]

While noting that it is "obvious and unarguable" that "Congress under the Constitution has power to safeguard our Nation's security," and affirming that "the

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[92] This resolution is discussed in ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS 22-23 n.3 (1987).
[93] *Aptheker v. Secretary of State*, 378 U.S. 500, 505.

Constitution . . . is not a suicide pact,"[94] the Court noted that the statute would prohibit travel by individuals even if they were unaware that the organization they belonged to was "further[ing] aims of the world Communist movement." Furthermore, the Court observed that the law "renders irrelevant the member's degree of activity in the organization and his commitment to its purpose."[95]

In concluding that more narrowly drawn legislation could achieve the national security purposes of the act, the Court quoted President Eisenhower as saying that "Any limitations on the right to travel can only be tolerated in terms of overriding requirements of our national security, and must be subject to substantive and procedural guarantees."[96]

Embracing what sounds very much like an "unconditional conditions" analysis, the Court reasoned:

> The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the Government seems to do, that a member of a registered organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization. Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.[97]

It should be kept in mind that, like *Kent v. Dulles, Aptheker* involved an effort to deny specific individuals a passport and not an area restriction on travel such as exists with respect to Cuba.

### *Zemel v. Rusk:* Travel Ban to Cuba Upheld

In 1965 the Court considered a constitutional attack on the State Department regulations prohibiting travel to Cuba without special authority from the Secretary of

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[94] *Id.* at 509.
[95] *Id.* at 510.
[96] *Id.* at 513.
[97] *Id.* at 507.

State.[98] This time, the Government won. The Court found statutory authority implied in the 1926 Passport Act in view of the well established practice of the Executive in restricting travel, and found there was no first amendment right involved in such a situation.[99] Speaking for the Court's 6-3 majority, Chief Justice Warren distinguished the case from *Kent*:

> [T]he issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations. . . . In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.[100]

It is perhaps noteworthy that even Chief Justice Warren recognized the institutional competency advantages of the Executive in the foreign affairs realm:

> It is important to bear in mind . . . that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.[101]

## The Post-Vietnam Congressional Constitutional Revolution

Mr. Chairman, a discussion of the Vietnam conflict is far beyond the scope of this afternoon's hearing, but a few observations may nevertheless be in order. I have testified extensively on this issue before other committees of both the Senate and the House of Representatives, and have published several books of relevance to the issue, so I shall not provide details at this time. Permit me to make just a few observations.

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[98] *Zemel v. Rusk*, 381 U.S. 1 (1965).
[99] *Id.* at 9, 16, 25.
[100] *Id.* at 20.
[101] *Id.* at 17.

First of all, contrary to the conventional wisdom, Vietnam was in no sense a "presidential war." (Neither, for that matter, was Korea.[102]). Indeed, in part because Lyndon Johnson was a former Senate Majority Leader, he made sure that Congress played a far more active role in the decision to go to war in Indochina than it had played in such policy decisions as the Monroe Doctrine and Truman Doctrine. Congress not only approved statutory authority to use combat forces in Indochina, but it more than doubled LBJ's initial request for funds for the war.

Nevertheless, when the public (which originally strongly supported the conflict—LBJ's approval rating shot up 30 full points in the Gallup Polls following his response to the Gulf of Tonkin incidents) grew weary of the conflict, members of Congress found it expedient to brand it "Nixon's War" and to pretend they deserved no responsibility for the conflict. In this process, Members began asking why the President had so much independent authority in connection with foreign affairs; and when they couldn't find the words "foreign affairs" in the constitutional text they concluded that Congress was really supposed to be the "boss" in that field.

As a result, numerous new constraints on the President's control of foreign intercourse were enacted—many of them flagrantly unconstitutional. (Even Senate Majority Leader George Mitchell admits that the War Powers Resolution, for example, infringes upon the President's clear constitutional power.[103]) Presidents Nixon and Ford fought admirably against these incursions into areas where Congress itself for nearly two centuries had acknowledged it lacked authority to act, but the election of Jimmy Carter in 1976 ended much of the resistance—although he did finally challenge the War Powers Resolution.

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[102] I have written a review for the November issue of the *Virginia Journal of International Law* that will demonstrate that President Truman consulted carefully with Congress about the need for formal authorization and indeed had a resolution of approval drafted. However, Foreign Relations Chairman Tom Connally and Senate Majority Leader Scott Lucas were among several members to urge him not to seek congressional approval and assured him his independent constitutional authority was sufficient.

[103] CONG. REC. 6177-78 (19 May 1988).

One of President Carter's initiatives was to authorize travel to Cuba shortly after taking office in 1977. Later that year, "as part of its effort to curtail excessive presidential discretion in foreign affairs,"[104] Congress amended section 5(b) of the Trading With the Enemy Act—authorizing the President to "regulate, direct and compel, nullify, void, prevent or prohibit . . . exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest"[105]—so that it applied only in wartime.[106] However, Congress included a "grandfather" clause permitting the President to continue exercising "the authorities conferred upon the President by section 5(b) . . . which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date."[107]

At the same time, provision was made for peacetime emergency authorities in companion legislation, the International Emergency Economic Powers Act (IEEPA).[108] It may be important to note that IEEPA was phrased in terms of granting the President power—or in some cases clarifying that the powers being granted would not include certain other powers—rather than as an effort to prohibit the President from acting in a particular manner on a specified subject. That is to say, to the extent that the President had independent constitutional authority to act on the basis of his "executive" or "commander in chief" power, the language of IEEPA did not attempt to challenge such authority.

### Prohibiting Passport Restrictions on Cuba

The following year, Congress amended the 1926 Passport Act to include this language:

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[104] *Executive Branch Power: Right to Travel Abroad*, 98 HARV. L. REV. 184, 185 (1984).
[105] 50 U.S.C. App. § 5(b).
[106] 98 HARV. L. REV. at 185.
[107] Pub. L. 95-223, *quoted in id.* at 186.
[108] 50 U.S.C. §§ 1701-1706 (1982).

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers.[109]

It is my understanding that this was consistent with the policy preferences of the Carter Administration, and I am unaware of any constitutional challenge to the provision. (It would be difficult for a private citizen to establish standing, and even the Executive would have to wait for a "case or controversy" to bring the issue before the courts.) What can be said is that it represents a dramatic departure from the understanding of the Founding Fathers and all three branches of government as to the separation of powers in this area during the first nearly two centuries of our Nation's existence. I think it must be considered as constitutionally suspect and clearly bad policy.

### *Haig v. Agee*: The Court Upholds an Individual Travel Restriction

Issues similar to those raised in *Kent* and *Zemel* returned to the Supreme Court in 1981, in connection with the withdrawal of a passport from one Philip Agee, a former CIA employee who had been traveling around the world publicly releasing the names of U.S. government personnel he claimed were CIA agents. Armed attacks on several Americans occurred following some of his visits, and several Americans were murdered.[110] He also allegedly had made contact with Iranian officials holding American diplomats hostage and offered to travel to Iran and help identify the "CIA agents" among the diplomats.[111]

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[109] 22 U.S.C. § 211(a).
[110] *Haig v. Agee*, 453 U.S. 280, 285-86 (1981).
[111] *Id.* at 287.

Agee's behavior was so outrageous that not even the American Civil Liberties Union came to his defense; indeed, the ACLU helped to draft a statute making such conduct a crime.[112]

Speaking for a 7-2 majority, Chief Justice Burger upheld the December 1979 decision of Secretary of State Muskie to revoke Agee's passport. The Court found implicit authority for the action in the 1926 Passport Act when considered alongside a long-standing record of Executive conduct of a similar nature.[113] Without challenging the existence of a right to travel, the Court said that "the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations . . . ."[114] Concluding that it is "obvious and unarguable" that "no governmental interest is more compelling that the security of the Nation,"[115] the Court concluded that "The Constitution's due process guarantees call for no more than . . . a statement of reasons and an opportunity for a prompt postrevocation hearing."[116]

Although the Court majority sought to reconcile *Agee* with *Kent* and *Aptheker*, the two dissenting justices (Brennan and Marshall) argued that the decision "departed from the express holdings of those decisions . . . ."[117] Their claim was strengthened by the concurring opinion of Justice Blackmun, who wrote:

> There is some force, I feel, in Justice Brennan's observations . . . that today's decision cannot be reconciled fully with all the reasoning of *Zemel v. Rusk*, . . . and, particularly, of *Kent v. Dulles* . . ., and that the Court is cutting back somewhat upon the opinions in those cases sub silentio. I would have preferred to have the Court disavow forthrightly the aspects of *Zemel* and *Kent* that may suggest that evidence of a long-standing Executive policy or construction in this area is not probative of the issue of congressional authorization. Nonetheless, believing this is what the Court in effect has done, I join its opinion.[118]

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112 See Berman & Halperin, *The Agent Identities Protection Act: A Preliminary Analysis of the Legislative History*, in THE FIRST AMENDMENT AND NATIONAL SECURITY 41-43
113 453 U.S. at 306.
114 *Id*
115 *Id.* at 307.
116 *Id.* at 310.
117 *Id.* at 310.
118 *Id.*

During the same term, the Court reflected traditional deference to the Executive branch in the foreign policy realm in its decision in *Dames & Moore v. Regan,*[119] which cited with favor the reference in the landmark 1936 case of *United States v. Curtiss-Wright Export Corp.*,[120] to the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—*a power which does not require as a basis for its exercise an act of Congress* . . . . [Emphasis added.]"[121] The cases should be read together.

## *Regan v. Wald*: The Court Upholds the Use of Trade Legislation to Ban Travel to Cuba

President Ronald Reagan came to power in the wake of a resurgence of Cuban adventurism in Latin America and elsewhere. Although his authority to impose direct restrictions on passports was challenged[122] by the 1978 amendment to the Passport Act, he still had authority both under the Foreign Assistance Act of 1961 and—arguably—the Trading With the Enemy Act (which had stronger penalties). Unclear was whether the "grandfather" clause of the 1977 TWEA amendments had included travel restrictions on Cuba, since even though President Carter had suspended their application it was arguable that the "authority" to impose travel restrictions on Cuba was still being "exercised." The President elected to rely upon the grandfathered TWEA authority, and in 1982 he reimposed travel restrictions on Cuba as a means of denying Castro hard currency with which to fund his unlawful intervention in various countries.

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[119] 453 U.S. 654 (1981).
[120] 299 U.S. 304 (1936).
[121] *Id.* at 319.
[122] I have chosen this term carefully, because I am not persuaded that the statute is a lawful exercise of legislative power or that the Supreme Court in 1982 would not have struck it down. (I believe the issue is arguable either way.)

The action was promptly challenged in the courts, and the issue reached the Supreme Court in 1984 in the case of *Regan v. Wald*.[123] With Justice Rehnquist speaking for the 5-4 majority, the Court upheld the President's actions. I shall not discuss the case in depth, as I suspect most, if not all, of the members of the Subcommittee are quite familiar with it.

I would note, however, that this time—citing *Haig v. Agee*—the Court expressly acknowledged that the broad "constitutional right to travel" language of *Kent v. Dulles*, which had compared the right to travel abroad with the right of citizens to travel within the United States, "has been rejected in subsequent cases."[124] Further, the Court noted, "Both *Kent* and *Aptheker* . . . were qualified the following Term in *Zemel v. Rusk*.[125] The Court emphasized that there were no first amendment issues involved in the "across-the-board restriction" on travel to Cuba,[126] and concluded further that "such restrictions do not violate the freedom to travel protected by the Due Process Clause of the Fifth Amendment."[127]

## 1994 State Department Authorization Bill

Six months ago, Congress included at least two provisions of possible relevance to this hearing in the State Department Authorization Bill: a section on the "Free Trade in Ideas" and, immediately thereafter, a "sense of the Congress" provision urging the President to seek "a mandatory international United Nations Security Council embargo against the dictatorship of Cuba."[128] The only observations I will make about the second is that it may suggest that most Members are not yet prepared to try to improve relations

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123 468 U.S. 222 (1984).
124 *Id.* at 240 n. 25.
125 *Id.*
126 *Id.* at 241.
127 *Id.* at 244.
128 Pub. L. 103-236, 108 Stat. 475, § 526 (1994).

with Cuba by moderating existing policies; and I was pleased to see that this was a "sense of the Congress" provision and not another unconstitutional direction to the President to pursue some type of diplomatic negotiations.

Section 525 begins by expressing the "sense of the Congress" that the President should not restrict travel between the United States and "any other country" for "informational, educational, religious, cultural, or humanitarian purposes or for public performances or exhibitions . . . ."[129] The juxtaposition of these two provisions, side by side in a rather large act, demonstrates how seldom Congress acts with what the Founding Fathers sometimes referred to as "unity of design"—another fundamental requirement for success in foreign policy. A foreign visitor reading this statute for the first time might be confused to see Congress apparently urging the President not to object if a group of Americans want to fly down to Havana to hear Comrade Fidel give a "public performance" denouncing "American imperialism" for a few hours; while at the same moment the same Congress is calling for an "international embargo" (presumably not just an "economic" embargo?) against "the dictatorship of Cuba." Still, both provisions are relatively benign and carry no legal force.

Even more remarkable is subsection (b) of this part of the act, which denies the President any authority under the Trading With the Enemy Act to "regulate or prohibit" a variety of products, "commercial or otherwise," that appear to have the common factor of being media of communications (e.g., "films, posters, . . . microfiche, tapes, compact disks, CD ROMs, artworks").[130]

Subsection (c) of the 1994 statute would amend IEEPA to limit the President's authority to regulate various types of "communications" and such things as "donations of articles . . . to be used to relieve human suffering . . ." under certain conditions. Given the current situation in Cuba, I can't say that I find either of these provisions all that

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[129] *Id.*, § 525(a).
[130] *Id.* § 525 (b).

objectionable on the merits—although if the President could not be persuaded without passing a law to embrace such a policy the odds are good that I don't fully understand all of the implications.

Again, however, it is difficult to understand how Congress expects the President to promote a commercial film industry in Havana while at the same time you are urging him to go up to New York and persuade the Security Council to impose an "embargo" against Cuba. What if he succeeds and gets the "embargo" Congress says it wants—while in the same breath Congress has directed that the President must violate that embargo if it involves such things as "food, clothing, and medicine." (Presumably he will be expected to insist that the more than a dozen items identified in subsection 525 (b)(1), and the "food, clothing, and medicine" [and other unspecified "articles"] referred to in subsection 525 (b)(2), will be *excluded* from the UN embargo. This, in turn, will be the signal for the other Security Council members to come up with their *own* lists of exceptions—producing a meaningless Security Council Resolution at best while signaling our diplomatic partners that, once again, America "does not have its act together.")

If the 1994 amendments demonstrate anything it is that Congress really doesn't do "foreign policy" very well—but that's hardly a new or remarkable observation. They stand as further evidence of the wisdom of the Founding Fathers in allocating to the President responsibility for the general management of the nation's external intercourse. Indeed, it strikes me that the entire post-Vietnam experiment in reallocating the constitutional powers of government has produced little benefit other than a confirmation of the brilliance of the original scheme; and the time has long since come to return to that vision.

## Issues of International Law

Let me turn just briefly to the related issue of whether there is a "right to travel" under international law.[131] When I worked in the Senate in the mid-1970s, that was an issue of some interest—and the Jackson-Vanik Amendment[132] denying Most Favored Nation status to the Soviet Union because of its refusal to allow Soviet Jews to emigrate to Israel was premised in no small part upon the perception that this violated acceptable international standards of behavior.

More recently, when the Congress amended the Passport Act of 1926 to deny the President authority to impose area restrictions on foreign travel, the stated motive was to comply with the requirements of the Final Act of the Conference on Security and Cooperation in Europe (CSCE)—often known as the Helsinki Accords.[133] Incorporated into the Final Act was a Declaration on Principles Guiding Relations between Participating States, the seventh principle of which was "Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief." In addition, the Final Act contained a section on "Cooperation in Humanitarian and Other Fields," which under the heading of "Human Contacts" provided, *inter alia*:

> *(d) Travel for Personal or Professional Reasons*
>
> The participating states intend to facilitate wider travel by their citizens for personal or professional reasons and to this end they intend in particular:
>
> — gradually to simplify and to administer flexibly the procedures for exit and entry;
>
> — to ease regulations concerning movement of citizens from the other participating states in their territory, with due regard to security requirements.[134]

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131 For a more detailed discussion of these issues, *see* HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE (1987).

132 19 U.S.C. §§ 2431-2441 (1988).

133 73 DEP'T STATE BULL. 339-41 (1975); 14 INT'L LEGAL MATERIALS 1292 (1975).

134 *Reprinted in* ELANOR C. MCDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975 at 190-92 (1976).

Nothing in this language suggest that such "procedures" and "regulations" were viewed as illegal under international law. It should also be noted that the Helsinki Final Act was a political document and was not intended to establish legally-binding rules of behavior.

Nearly three decades earlier, the UN General Assembly approved (by a vote of 48-0-8) the Universal Declaration of Human Rights—referred to by some as the "International Bill of Rights"—which provided in part:

> *Article 13*—1. Everyone has the right to freedom of movement and residence within the borders of each State.
> 2. Everyone has the right to leave any country, including his own, and to return to his country.[135]

While the United States voted in favor of this declaration, it was understood at the time to be an aspirational *political* instrument and not the source of new legal rights. Nevertheless, it certainly serves as evidence of customary international law—and in the eyes of many scholars has taken on the status of a legal document.

A thorough discussion of these issues is beyond the scope of my testimony this afternoon, but a few observations can be made. There is clearly more *political* support among nations for the "principle" of free travel than there are States willing to make clear and precise *legal* commitments to respect such a "right." Among other things, many States have "national security" concerns not all that dissimilar from those which have led the United States to limit foreign travel on occasion; and there is also a significant concern within the Third World about the risks of "brain drain" if highly educated citizens are given a right to pursue more lucrative opportunities abroad. Thus, despite a variety of rather general international documents endorsing the idea of free travel, it would be very difficult to establish that there is at present an established customary international law establishing such a right in any meaningful sense.

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[135] U.N.G.A. Res. 217 (III 1948).

The United States is a party to the International Covenant on Civil and Political Rights,[136] a binding international treaty, which in article 12 does address the issue of international travel:

> *Article 12.* 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions *except those which are provided by law, are necessary to protect national security,* public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country. [Emphasis added.]

Unlike some of the other documents, the Covenant is intended to be a binding treaty. It includes enough slack—expressly recognizing the permissibility of "national security" restrictions—to permit current U.S. practice; but it arguably creates a duty to establish such restrictions "by law." This is a complex issue that may warrant further discussion (but may be beyond the jurisdiction of your Subcommittee); but it should be kept in mind that the Constitution itself is not only a "law," but our "supreme" law, and actions taken by the President in fulfillment of his constitutional responsibilities would not seem to violate the Covenant's requirement that rights not be restricted except as "provided by law."

Furthermore, particularly with respect to the travel restrictions on Cuba, it must be kept in mind that the Organization of American States has officially called upon Member States to impose an embargo against Cuba in response to Castro's gross violations of the most fundamental principles of international law through his intervention in other Member States. As John Marshall observed in 1800, it is the President's duty to decide in the first

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136 999 U.N.T.S. 171 (1976).

instance[137] how the Nation will carry out its treaty commitments with other States.[138] This duty is spelled out in the Constitutional duty to "take Care that the Laws be Faithfully executed . . . ."[139]

## Considerations of Policy: Substance and Process

Mr. Chairman, one of the risks you run when you invite a witness who for many years taught U.S. Foreign Policy and has worked in the policy side of the national security apparatus of government is that you will get unsolicited advice of a *policy* nature. I hope you will permit me to make two observations, and to expand at least briefly upon one of them.

### Is It Time to Reconsider Our Cuba Policy?

First of all, it strikes me that there are some persuasive reasons to reconsider some of our policies toward the Castro regime in Cuba on the merits. Castro came to power by overthrowing a minor tyrant who was hardly serving the interests of the Cuban people; but Castro's human rights violations—not to mention virtually serving as Moscow's "rent a mercenary" in Africa and elsewhere for years—have caused far more suffering and killed far more people (and not just in Cuba) than Batista could have dreamed of doing. Other than the fact that he is growing old, I see no evidence that Castro has had a change of heart. The "moderation" that may now be present in Cuban foreign policy is primarily, if not exclusively, an inevitable byproduct of the collapse of the Soviet Empire. Put simply,

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[137] Assuming that his response does not require additional appropriations, a declaration of war, or other authority committed by the Constitution to the Senate or the Congress.
[138] *See supra*, text accompanying note __.
[139] U.S. CONST. art. II, sec. 3.

Moscow is no longer pouring hundreds of millions of dollars into Cuba to underwrite Fidel's foreign adventurism. If Castro got back on his feet, there is little reason to believe he would forswear further mischief.

Nevertheless, it does appear that Castro has moderated his adventurism; and the foreign intervention which led to both the O.A.S. and U.S. sanctions reportedly has ceased. Furthermore, it is clear that the people of Cuba have suffered greatly as a consequence of the embargoes imposed by the United States and other countries. If promoting American interest ought to be the first principle in this decision process, the short- and long-term welfare of the Cuban people is also worthy of careful consideration.

I believe an arguable case can be made that the time has come to lift the embargo, and to use positive incentives to promote both the economic recovery of Cuba and its transition to democracy and a market economy. In the long run, I am convinced that it is in our interest to help Cuba join the growing club of free and democratic States and play an active role in hemispheric affairs. To me, the question is whether our goals—which certainly should include making sure Castro doesn't resume his adventurism and promoting (or at least not undermining) a (hopefully peaceful but prompt) transition to democratic institutions, human rights, and economic freedom in Cuba—will be better served by lifting the embargo now or by keeping the pressure on until Castro has been replaced by a more promising regime.

In this regard I would call your attention to the cover story in last week's *New Republic*, which provides a first hand account of the truly dismal situation currently facing the Cuban people. It is always tragic when good people are made to suffer by the actions of the world community for the crime of living under a dictator—be they in Cuba or Iraq. But the writer reports:

> Still, the consensus among Cubans I spoke with was surprisingly favorable toward Clinton's hardish line . . . . Most said that a prompt end to the U.S. trade embargo would deprive Castro of his final political

> argument, but that this benefit might be outweighed by an inflow of dollars Castro would use to perpetuate his rule.[140]

Candidly, I don't know if they are right, or not. Give me a choice between outcomes and I will tell you that provoking a bloody civil war in Cuba would be tragic, expediting the transfer of power to a freely-elected democratic government committed to human rights and economic freedom would be desirable, and keeping Castro out of drug and terrorism enterprises until a transition can take place is a *very* high priority. How best to do that I will defer to those with more accurate and up-to-date information.

Let me just add as an aside that I agree with the underlying policy judgment inherent in some of the proposals that have been made in this area that there ought to be a presumption against restricting travel and the free flow of ideas in the absence of either personal risks to our citizens or substantial national security considerations. Indeed, if I did not believe that ideas were important I would not be making my living as a schoolteacher.

**Process Makes a Difference—**
**There Is Wisdom in the Constitutional Design**

So much for substance. My second, and more important, policy consideration is that we are more likely to have a successful foreign policy if Congress allows the President to fulfill his constitutional mandate as the Nation's foreign affairs leader. I believe we could reach a consensus that the United States should embrace a policy that promotes a peaceful end to the Castro regime and a transition to a democratic and prosperous Cuba, respectful of human rights and other international obligations, and willing to play a positive role in the community of nations. I may be mistaken, but my guess is that the President—

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[140] Charles Lane, *The Long, Long Good-Bye*, NEW REPUBLIC, 3 Oct. 1994, at 18.

with his experts in the State Department and often secret information provided by diplomatic and intelligence sources—is in a better position to make that decision that I am, or for that matter than is the Congress.

So, on balance, while I recognize that the arguments for permitting travel and also international trade with Cuba are substantial, I believe the Congress would be wise not to impose a decision on the constitutional authority who is charged with primary responsibility for our external relations. I didn't vote for him last time and I don't expect to vote for him next time; but, until a successor takes office, Mr. Clinton is the only President we are going to have. As we face an increasingly complex and not always friendly external world, he is our quarterback. He is inexperienced, he has erred in the past, and he will likely stumble more than once in the future—but let it not be said that he was sacked by his own team.

The reason that John Locke (and the Founding Fathers) believed that the management of the Nation's external intercourse had to be given to the Executive was not because such matters are unimportant, but because legislative bodies simply lack the institutional competence to fulfill this responsibility effectively. In *Federalist* No. 64, John Jay paraphrased Locke when he spoke of rapid "tides" of events and the need for flexibility to respond with "speed and dispatch" and "secrecy" to foreign developments. You can't effectively control the conduct of foreign governments by antecedent laws, and time and again, when Congress has tied the President's hands, events have occurred which demonstrated the folly of the decision.

The Cooper-Church Amendment designed to prohibit the President from committing ground forces back into combat in Indochina, for example, technically would have blocked President Ford from rescuing the crew of the *SS Mayaguez* in May 1975—but Senator Church explained that the Congress hadn't been thinking of such a situation when they tied the President's hands. Fortunately, President Ford had the courage to

"break the law"[141] in that case. Similarly, after the dramatic breakthrough during Operation Desert Storm, many Members of Congress denounced President Bush for stopping "forty-eight hours too soon" or not going on to Baghdad. Little noticed was the fact that Senate Joint Resolution 2, the bill you (barely) approved authorizing him to use force against Saddam Hussein, clearly prohibited U.S. forces from going one foot beyond the boundaries of Kuwait.

Mr. Chairman, I would suggest that the situation is a little like a chess game—more precisely, a game of speed chess, but with virtually infinite boundaries on the board, several invisible pieces, and more than 100 "official" players. There is no way that speed chess can be played by a "committee"—and the Founding Fathers knew this well from their efforts to micromanage the Revolutionary War. President Clinton is in charge of our foreign intercourse not because he is brighter, or more experienced, or in any way morally superior to anyone on this Subcommittee; he has this responsibility because the American people elected him to be their President. Congress lacks both the constitutional mandate and the institutional competency to take control of that mandate; and when, in frustration, you tie his hands, you almost always harm the Nation.

An intelligent president should want—and *needs*—your advice on the "big picture" issues, and he may well need your formal approval of treaties as well a appropriations to fund policy initiatives. But under the Constitution, the President has the lead. To paraphrase Churchill, it is a horrible system—until you consider all of the others. You are as likely to successfully manage the intricate and fluid business of foreign relations by antecedent law as you are to solve the problem of destructive weather by imposing a large

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[141] I use quotation marks here because I do not believe the President actually "breaks the law" when he refuses to comply with a congressional directive which he honestly believes clearly infringes upon constitutional powers vested by the people in the Chief Executive. I have no doubt but that President Ford had independent constitutional authority to act as he did in evacuating at least the Americans from Indochina, and that power could not have been taken from him by simple statute (e.g., the War Powers Resolution).

fine on every tornado that touches ground within 100 meters of a trailer park. Neither foreign government officials nor the weather will be bound by your legal pronouncements.

What Congress can do—although in so doing you will often violate your oath of office to uphold the Constitution—is pass "laws" tying the President's hands and trying to compel him to deal with one isolated problem or another in a way that pleases Congress (or, equally as likely, a particularly powerful and vocal constituency group). The statute books in the post-Vietnam era have been filled with hundreds of such provisions—virtually none of them taking into consideration the "big picture" of the nation's national security interests. Many of them, such as the Neutrality Acts of the 1930s and the 1975 Clark Amendment baring funds for Angola, have been subsequently recognized even by Congress to have been *terrible* ideas. When the full story of Vietnam is told—and that's another topic I've taught many classes on—the record will show that Congress not only abandoned a worthy cause for which 58,000 fine young men had sacrificed their lives, but it also needlessly condemned tens of millions of people to one of the most repressive Stalinist dictatorship in the world and millions of others to horrible death. Before you decide to impose your foreign policy judgments upon the Executive, I would at least caution you to reflect for a few minutes about the consequences of similar behavior by those in this chamber who came before you. On balance, it is not an impressive record.

It sometimes appears as if Congress is so incensed at not being allowed to move the chess pieces, that various Members take turns walking over to the board and grabbing away pieces from the American side of the board. Sometimes this is done because a particular knight or bishop really does seem to be vulnerable—because we don't realize that it is the "bait" that may soon lead to forking the enemy's king and queen. But anyone who believes that America's long-term interests are going to be served by having Congress tie the President's hands is in my view sadly mistaken.

Sometimes, as when the issue involves foreign commerce, Congress has clear constitutional authority to limit the President's options. You can snatch up a bishop, grab a

couple of pawns—and the President can't do much more than complain. He will then have to continue the game in a weakened position—from a self-inflicted wound—and the odds that he will lose are greater. Also greater are the odds that he will have to bring his queen into action earlier—and that may escalate the game and result in some of the remaining pawns soon coming home in body bags. The likelihood of armed conflict becomes much greater when Congress ties the President's hands, not just because Congress has denied the President other options but because by so acting Congress has sent exactly the wrong signal to our adversaries and potential allies alike.

I have argued in prior testimony before the House Armed Services Committee that a very strong case can be made that congressional partisanship and irresponsibility was largely responsible for the terrorist attack on 23 October 1983 that killed 241 Marines in Beirut. Marine Commandant P.X. Kelley virtually *begged* the Senate Foreign Relations Committee to stop the partisan debate over setting a withdrawal date, warning that the Senate debate was endangering our troops in Lebanon. The Senate ignored his warning, and the final vote approving continuation of the deployment was extremely close. Senators announced publicly—presumably to reassure concerned constituents—that if there were any further casualties, the vote could be "reconsidered" at any time.

During this debate, the Syrian Foreign Minister was heard to state that "the Americans are short of breath," and Syria and other radical States were emboldened by the process. Shortly after the narrow Senate vote on the Lebanon resolution, our intelligence people intercepted a message from Islamic terrorists saying "If we kill fifteen more Marines, the rest will go home." Days later, 241 Marines were dead. I don't mean to be disrespectful, Mr. Chairman, but I honestly believe that the partisan[142] behavior of the

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[142] The report on the resolution from the Foreign Relations Committee included a section called "Minority Views of all Democratic Members of the Committee" (or words to that effect). During my five years working with that committee—including the final years of the Vietnam crisis—I can't recall a single incident of such obvious partisanship.

Senate virtually put a "bounty" on the lives of those fine men. It was in my view as inexcusable as it was tragic.

## Conclusions

Mr. Chairman, I believe the Supreme Court has established beyond reasonable doubt that there are no constitutional impediments to area travel bans like that currently in effect in Cuba. Therefore, I think it is a reasonable conclusion that such a ban does not require statutory authority. On the contrary, with about two centuries of consistent practice as a guide, I believe it is clear that the President has independent constitutional authority to impose such a ban as a passport restriction without authority of Congress.[143]

A more difficult question arises now that Congress, in its wisdom, has enacted a statutory prohibition against such passport restrictions. May the Congress deny the President authority to act in these circumstances?

There are two constitutional standards by which such a conflict could be measured, and although it is popular[144] to pretend that the 1936 *Curtiss-Wright* approach—by far the most often cited authority for foreign affairs cases—has been narrowed or even overturned

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[143] I don't believe this precise issue has been addressed by the Supreme Court, although in the *Agee* case the Court acknowledged the existence of a possible claim. Because the Court decided that the President's action had a statutory basis, it observed:

> In light of our decision on this issue, we have no occasion in this case to determine the scope of "the very delicate, plenary and *exclusive power of the President* as the sole organ of the federal government in the field of international relations—a power *which does not require as a basis for its exercise an act of Congress*, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

453 U.S. at 289 n.17 [emphasis added].

[144] My friend Professor Harold Koh deserves much of the credit for popularizing this view, which was recently embraced by Professor John Hart Ely in his new book, *War and Responsibility*. It is widely held by many others as well.

by Justice Jackson's concurring opinion in the *Steel-Seizure* case (*Youngstown Sheet & Tube Co. v. Sawyer*), the two cases are quite easy in my view to reconcile. Throughout both Justice Black's majority opinion and the famous Jackson concurrence in *Youngstown* is the theme that seizing control of the Nation's steel mills, even during time of "emergency" (the Korean conflict), is a "domestic" action which requires "due process of law." Personally, I don't find the case that remarkable—I believe the fifth amendment clearly demands as much.

Time and again, Justice Jackson emphasizes that he is talking about the President's "internal" and "domestic" actions, and the stresses that he would give the President the widest latitude if his actions had been "external" to the country. In contrast, the *Curtiss-Wright* case has for more than fifty years been the landmark Supreme Court decision on the President's *foreign affairs* powers. Indeed, Justice Jackson cited the *Curtiss-Wright* decision in his Youngstown concurrence and characterized it as affecting "a situation in foreign territory . . . ."[145] Noting that seizing a steel mill within the United States was not such a case, he said of *Curtiss-Wright:* "That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs."[146]

This distinction was also noted by Justice Rehnquist in *Goldwater v. Carter,* joined by three other members of the Court:

> The present case differs in several important respects from *Youngstown Sheet & Tube Co. v. Sawyer* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. . . . [A]s in *Curtiss-Wright*, the effect of this action, as far as we

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[145] 343 U.S. at 637 n.2.
[146] *Id.* at 637.

> can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."[147]

Such a distinction between the cases is in my view compelled by a careful reading of the two important decisions.

I would suggest that so long as the courts continue to assert that the Constitution establishes a "right to foreign travel," the President's authority to deny passports to individual citizens in cases like *Kent* and *Aptheker* (and perhaps even *Agee*) must have at least an implicit legislative basis and is subject to limitation by Congress. Candidly, I believe the historical "evidence" relied upon by Justice Douglas in *Kent* to create such a right cannot withstand serious scrutiny; but until the Supreme Court elects to abandon the position it must stand as binding law. Furthermore, when individual rights are involved, there are various other constitutional protections—particularly those embodied in the first amendment—which must be respected by the President. (Thus, not only may the Executive not deny passports to citizens solely because of protected domestic speech or association, but it also may not deny a passport because of an applicants race, gender, religion, or similar qualities baring an incredibly powerful governmental interest.)

On the other hand, the Supreme Court has now stated that area restrictions involve neither first nor fifth amendment rights of individuals. I would argue that makes *Curtiss-Wright* the proper standard of analysis, and that leads to the clear conclusion that the President has independent authority—vested in him by the American people through the Constitution—to regulate such travel. I don't believe that Congress can change that constitutional allocation of authority by simple statute, and I don't see a competing congressional power that can override a decision by the President.

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[147] 444 U.S. 996, 1004-05 (1980).

This is not to say that Congress may not "regulate" foreign commerce by imposing travel restrictions of its own.[148] I think the case is arguable—for the same reasons that I would hope we would all agree that Congress could not use its "commerce" power to direct the President how to conduct military operations—but it is quite possible that both the President and Congress have some constitutional authority to impose restrictions on the issuance of passports.

It should, however, be kept in mind that the Constitution does not provide that article I, section 8, powers are the *exclusive* means of achieving the stated ends. In reality, decisions concerning "Taxes, Duties, Imposts and Excises,"[149] the regulation of "Commerce with foreign Nations,"[150] duties of naturalized citizens,[151] protecting intellectual property,[152] defining and punishing "Felonies committee on the high Seas, and Offenses against the Law of Nations,"[153] "fixing the Standard of Weights and

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[148] In his concurring opinion in *Aptheker*, Justice Black expressed the view that Congress had authority to "regulate the issuance of passports under its specific powers to regulate commerce with foreign nations." 378 U.S. at 518.

[149] U.S. CONST. Art. I, Sec. 8. *See, e.g.*, Convention establishing a Customs Co-operation Council, Done at Brussels, December 15, 1950. 22 UST 320; TIAS 7063; 160 UNTS 267; Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains (US-UK), signed at London, December 31, 1975. 31 UST 5668; TIAS 9682.

[150] U.S. CONST. Art. I, Sec. 8 *See, e.g.*, Convention to regulate commerce (US-UK). Signed at London, July 3, 1815. 8 Stat. 228; TS 110; 12 Bevans 49. United Nations convention on contracts for the international sale of goods. Done at Vienna, April 11, 1980; Convention on facilitation of international maritime traffic. Done at London April 9, 1965. 18 UST 411; TIAS 6251; 591 UNTS 265; Agreement to refrain from invoking the obligations of most-favored-nation clause in respect of certain multilateral economic conventions. Done at the Pan American Union, Washington, July 15, 1934. 49 Stat. 3260; TS 898; 3 Bevans 252; 165 LNTS 9.

[151] U.S. CONST. Art. I, Sec. 8. ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization"). *See, e.g.*, Protocol relating to military obligations in certain cases of double nationality. Concluded at The Hague, April 12, 1930. 50 Stat. 1317; TS 913; Bevans 1049; 178 LNTS 227.

[152] U.S. CONST, Art. I, Sec. 8. ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). *See, e.g.*, Convention on literary and artistic copyrights. Signed at Buenos Aires, August 11, 1910. 38 Stat. 1785; TS 593; 1 Bevans 758; Patent cooperation treaty, with regulations. Done at Washington June 19, 1970. 28 UST 7645; TIAS 8733; Convention establishing the World Intellectual Property Organization, Done at Stockholm, July 14, 1967, 21 UST 1749; TIAS 6932; 828 UNTS 3.

[153] U.S. CONST. Art. I, Sec. 8. *See, e.g.*, Convention to suppress the slave trade and slavery, concluded at Geneva September 25, 1926, 46 Stat. 2183; TS 778; 2 Bevans 607; 60 LNTS 253; Convention to punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance. Done at Washington, February 2, 1971. 27 UST 3949; TIAS 8413.

Measurements,"[154] regulating postal matters,[155] making "Rules concerning Captures on Land and Water,"[156] and virtually every other Article I, section 8 power are routinely handled by treaty or executive agreement. To the extent that the President has an independent constitutional basis for action, the fact that Congress, too, has constitutional powers on the subject matter should not preclude the President from acting.

The Supreme Court would almost certainly uphold an otherwise reasonable legislative constraint on the issuing of passports against a private challenger, but the more interesting question might arise if the President instructed the Secretary of State to ignore such a provision. I think that would be an unlikely scenario in the real world, unless Congress sought to use its commerce power to flagrantly infringe upon the President's independent constitutional responsibility. If, for example, the Congress were to attempt to deny use of a passport to any government employee directed by the President to engage in some specified international negotiation, it would clearly be an abuse of power and I would hope (and expect) the Court to uphold an Executive decision to ignore the statute. A similar result would accompany a congressional effort—whether attempted by a passport control under the commerce power or a conditional appropriation of funds—to coerce the Executive into concluding any type of international agreement. Under our Constitution, the Senate has an important role in the treaty-making process. But as the Supreme Court observed in *Curtiss-Wright:*

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a

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[154] U.S. CONST. Art. I, Sec. 8. *See, e.g.*, the Convention concerning the creation of an international office of weights and measures, regulations and transient provisions. Signed at Paris, May 20, 1875. 20 Stat. 709; TS 378; 1 Bevans 39.

[155] U.S. CONST. Art. I, Sec. 8. *See, e.g.*, Agreement for the direct exchange of parcels by parcel post (US-UK), Signed at Washington, October 1 and at London, October 27, 1924. 43 Stat. 1854; Constitution of the Universal Postal Union. Done at Vienna July 10, 1964. 16 UST 1291; TIAS 5881; 611 UNTS 7.

[156] U.S. CONST. Art. I, Sec. 8. *See, e.g.*, Convention relative to the treatment of prisoners of war, done at Geneva August 12, 1949, 6 UST 3316; TIAS 3364; 75 UNTS 135; Convention regarding the rights of neutrals at sea. Signed at Washington, July 22, 1854. 10 Stat. 1105; TS 300; 11 Bevans 1214; Convention with respect to the laws and customs of war on land, with annex of regulations. Signed at The Hague, July 29, 2899. 32 Stat. 1803; TS 403; 1 Bevans 247.

> representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. **Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.** [Bold emphasis added.][157]

This is true irrespective of the vehicle Congress elects to use. Clearly, Congress may not use its legitimate powers for the purpose of bringing about an unconstitutional end.[158]

With the Subcommittee's indulgence, Mr. Chairman, I would like to leave you with an anecdote—a story I was told by Ambassador Vernon Walters, one of our nation's more able and distinguished diplomats, when we worked together in the Department of State in 1984. It concerns a secret mission to Havana General Walters made on behalf of President Reagan in February 1983. His mission was to put Castro on notice that the United States was very much aware of the extent of Cuban intervention in Latin American—training guerrillas, smuggling arms into Nicaragua to be transshipped to El Salvador and other targets, and the like—and that such behavior would not be tolerated by the Reagan Administration.

Castro listened quietly for a few minutes as General Walters—a man of considerable presence—delivered his message. But then the Cuban dictator cut him off. I don't know the verbatim language, but the message was clear: "Sit down, General. Don't lecture me. I happen to know your system very well. And I know that, whatever Ronald Reagan or any other American president wants to do to me, your Congress will not let him do it." The mission was not a success. Castro continued his efforts to overthrow our neighbors to the south. Deterrence failed.

Why would Fidel Castro think that the American Congress would protect him? Well, consider for a moment the facts as he had observed them:

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[157] 299 U.S. at 319.

[158] On the issue of "purse string" restrictions, *see* Robert F. Turner, *The Power of the Purse*, in THE CONSTITUTION AND NATIONAL SECURITY 73 (Howard E. Shuman & Walter R. Thomas, eds. 1990).

• When President Nixon decided to get serious about Communist aggression against South Vietnam in late 1972 and unleashed Operation Linebacker II on Hanoi, the shock brought the Communist delegations to their knees—and back to the Paris peace talks. But the following year, when Hanoi began to violate the Paris accords across the board, Congress passed a law cutting off all funds for any further United States response to defend South Vietnam, Laos, or Cambodia. The Communists subsequently conquered all three countries and imposed Stalinist dictatorships.

• A few months later, when Moscow decided to test the level of American war weariness and flew a few hundred Cuban mercenaries to Angola, Congress again responded by tying the President's hands. The so-called "Clark Amendment" prohibited all funds to help the two non-communist factions in the Angolan civil war (groups which collectively represented a clear majority of the people of the country). Nearly a decade later, when something like 50,000 Cubans were serving in various parts of southern Africa, Congress realized its error and repealed this statute. But when Vern Walters visited Castro in 1983 it was still on the books.

• By February 1983 Congress had already started passing "Boland Amendments" to limit the President's ability to respond effectively to Cuban and Nicaragua efforts to overthrow the elected government of El Salvador and other governments in the region.

Few members of Congress have any fondness for Fidel Castro, and it is likely that few even considered the signal they were sending to Havana when they voted time and again to tie the hands of the American president as he sought to respond to Communist

aggression on one continent after another. But, motives aside, the effect was the same. An honest appraisal of the two decades leading up to 1989 suggests that the Reagan Administration won the Cold War *despite* the various efforts of the Congress to tie his hands in the name of "peace."

As we meet here this week, many members of both Houses of Congress are calling for setting a timetable to force the withdrawal of U.S. troops from tiny Haiti. Castro is watching, as are Kim Jong Il and Saddam Hussein. If you decide, once again, to tie the President's hands—this time by preventing him from applying certain types of pressure on the Castro regime, you will be sending still another signal to the world's tyrants that the United States is disunited and is unlikely to stand firm in the face of serious external challenges to our interests. Irrespective of how strongly you feel that the President has erred in his policy toward travel to Cuba, I urge you to understand that the stakes involved in your actions are far greater than some of you may have realized. Put simply, you can not undermine the foreign policies of President Clinton without in the process weakening the foreign policies of the United States

Mr. Chairman, that concludes my prepared statement. I will be pleased to answer any questions you might have at this time.

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Senator SIMON. If I may respond, it will not surprise you, Professor Turner, that I slightly disagree with you here.

In terms of what the Constitution says in terms of foreign policy, there is no question the President has the right to lead and the responsibility to lead, but it is also true there is a strong Congressional voice. A treaty needs a two-thirds, not even a simple majority.

Mr. TURNER. Mr. Chairman, let me agree with you. I know you are in a rush for time. I will concede that, but my statement——

Senator SIMON. May I finish here, Mr. Turner?

Mr. TURNER. Yes, sir, Mr. Chairman. I am sorry.

Senator SIMON. It needs a two-thirds vote of approval. I just held up an Assistant Secretary of State because they had promised to consult with the Foreign Relations Committee on revision of the ABM treaty and then did not before they started negotiating. I think we have it straightened out now and the nominee is going ahead and I think there will be consultation in the future. But there is this balance.

In Angola, you mentioned the situation there. You said that Castro sent 40,000 troops and we were unable to respond. We had the strangest situation that I can ever recall in American foreign policy. The Cuban troops were there to defend the government of President dos Santos, who was a Marxist, no longer is, and I guess there aren't too many of them around anymore. But Chevron and Texaco had oil refineries in Angola. We were sending weapons to Dr. Savimbi, who was attacking the American oil refineries and Cuban troops were defending the American oil refineries. I don't know of any counterpart to that policy anywhere.

But I have to believe that even during the Angolan civil war, which is unfortunately still going on, we did not prohibit Americans from traveling to Angola because, if you were reasonably prudent, you could be safe. I was in Angola just a few months ago. I was in Liberia, another country with a civil war, just a few months ago.

But there is no comparable threat to American security I would have to say, in Cuba or also in Libya and Iraq or Iran. Again, I think we are protecting dictators through our policies rather than following an enlightened policy.

Ms. Martin, do you want to comment?

Ms. MARTIN. Yes, Senator. I might just add that here, there is no question about the President acting pursuant to inherent executive powers. He is acting solely pursuant to delegated statutory powers which the Congress can then take back.

I think the other point is that even when acting in the realm of foreign policy, the President is obliged to abide by the Constitution, including, and perhaps most significantly, the Bill of Rights, and that is properly Congressional prerogative to make sure that in acting in the realm of foreign policy he abides by the Constitution and that that is what I understand the committee to be considering and not a question of interfering in executive powers.

Senator SIMON. May I ask you, Ms. Martin, and I should know this, the International Covenant on Civil and Political Rights published by our Government, is that the human rights report that we make each year? What is that particular document?

Ms. MARTIN. No, it is a very recently-released report for the first time——

Senator SIMON. This is the one, July 28, 1994, but I don't know what——

Ms. MARTIN. The International Covenant was recently signed and ratified by the United States. It obligates each country to issue a report on its own compliance with the International Covenant. This is the first U.S. report on U.S. compliance with that International Covenant and it says in there, in addition that there is a constitutional right to travel, that it should only be restricted in extraordinary circumstances. It then doesn't explain how in the world it can justify its current policy as consistent with that standard.

Senator SIMON. Professor Turner, what do you think the ninth amendment means?

Mr. TURNER. I am glad to see you mention the ninth amendment. I would even mention the 10th amendment. I think it is important. It does say there are rights reserved to the people, and in particular that Congress does not have all power to regulate all aspects of American life.

If I could interject here, because I want to agree with you, one of the problems with trying to summarize eight or ten pages of my testimony in less than a minute is I spoke in very broad terms and I certainly didn't mean to say that the Senate does not have very important foreign policy powers and the Congress has important powers, including the power of the purse, but rather that the general management and the details of foreign policy are confined in the executive, not only to the executive but exclusively, and in many cases are beyond the control of Congress, at least according to the Supreme Court.

I also would agree with Ms. Martin's comments that the Bill of Rights is not suspended for national security reasons and that Congress has certainly a right and a duty to try to make sure that the executive is not violating legitimate first amendment rights. I don't think there is any question on that.

The question here is, is the right to control foreign travel granted in the Constitution, and I would argue that since it was a right exercised by most countries of the world when the United States came into existence as an executive function, that it comes within the language of the executive power.

Now that doesn't mean there is a completely arbitrary power of the Secretary of State to look out and say, well, anybody with red hair can't travel this year to countries that start with "A". There has to be a rational basis for it, and when you are talking about something other than an area restriction, there are procedural due process requirements that the Supreme Court has upheld that I find quite reasonable, but this is not one of the fundamental rights. This is a right that can be overcome by a reasonable government interest, and the Supreme Court in the *Agee* case noted that no government interest is more important than the security of the Nation.

Now you say that Castro has changed and others say that Castro has changed. He certainly has changed in his behavior, but I would note, as far as I can tell, he hasn't changed in his heart. That is to say, the reason that Castro is not bankrolling revolutions around

the world is because he is bankrupt. It is because we have him against the wall.

The policy issue here is one of, well, will it help us or hurt our interest in promoting human rights and a better way of life for the Cuban people and a transition to democracy and so forth by having these restrictions or not? I may come down on your side on the policy, but I think it is the President's call.

Senator SIMON. May I ask you a question?

Mr. TURNER. Yes, sir?

Senator SIMON. How many years would you give the policy of isolation to work to get Castro to fall? We have tried for quite a few decades already now.

Mr. TURNER. I think actually the policy has helped in some respects. The reason Castro is on the ropes now is, one, because we have cut him off. The OAS resolutions calling for an embargo of Cuba are still in effect. I just spoke with the OAS legal advisor's office last week and they say, yes, those resolutions are still in the book. The President has a duty, presumably, in faithfully executing the treaty commitments to the OAS in this area. Now how far it goes, we certainly aren't going to resolve that here in 2 or 3 minutes.

But I guess the point I am making is that is not my call. If I were President, I may well come down on the same side you are. I am not sure I would; I don't know. I suspect that the fact that the President has, suggests there are aspects of this issue that I have not thought about and am not privy to. The President has intelligence sources, diplomatic sources, and the like that I am not privy to and that normally are not shared on a realtime basis with the Congress, and that was one of the reasons the founding fathers gave him the primary responsibility.

Throughout 170 years of our history, the Congress understood that the regulation of travel abroad was part of his independent constitutional authority, required no statutory basis. The Congress didn't do anything that could even be argued as giving the President authority to impose restrictions until 1856, and when they did that, they did it in the context of saying the President has inherent power to do this. What they were really doing was outlawing the issuing of passports by State and local officials, notaries, and others who were causing problems for the Secretary of State.

Senator SIMON. Let me thank you. I hate to say I have not read your testimony prior to coming in here. We are at this end of the session chaos period. I particularly appreciate, Professor Turner, your giving me some historical background on all of this.

I have to say I am unpersuaded, particularly by one argument, if I may use this, because I hear this a lot. The President must have some inside information that we don't have in order to make decisions. I have, within the last 2 weeks, had two briefings, both of which included the Chairman of the Joint Chiefs of Staff and the Secretary of Defense, on Haiti. What I found in those two briefings was in top secret and even code word briefings over and over and over again, that I don't hear anything I can't read in the *New York Times* or the *Washington Post.*

We really ought to have access to information. I am not a supporter of Castro or Saddam Hussein or Gaddafi or any of the other

dictators around the world. I don't believe that a policy of isolating those dictators is a policy that benefits the people of those countries nor the people of our Nation.

But I thank you both very, very much for your testimony.

Mr. TURNER. Thank you, Mr. Chairman.

Ms. MARTIN. Thank you, Mr. Chairman.

Senator SIMON. Our final panel, Peter Hakim, the President of Inter-American Dialogue; Dr. Alicia Torres, executive director, Cuban-American Committee Research and Education Fund; Mary Gray, professor of Mathematics at American University; and George J. Du-Breuil, member of the board of directors of the Cuban Committee for Democracy.

I am very pleased to have all of you here. If you have no preference, I am just going to go down the line and start with you, Mr. Hakim.

**PANEL CONSISTING OF PETER HAKIM, PRESIDENT, INTER-AMERICAN DIALOGUE; ALICIA TORRES, EXECUTIVE DIRECTOR, CUBAN AMERICAN COMMITTEE RESEARCH AND EDUCATION FUND; MARY GRAY, PROFESSOR OF MATHEMATICS, THE AMERICAN UNIVERSITY; AND GEORGE J. DU-BREUIL, MEMBER, BOARD OF DIRECTORS, CUBAN COMMITTEE FOR DEMOCRACY**

**STATEMENT OF PETER HAKIM**

Mr. HAKIM. Thank you very much. I very much appreciate your invitation to be here today.

Let me say that the Inter-American Dialogue has given very high priority to its work on Cuba. We have a special task force on Cuba, precisely, one, because of its importance as an issue in and of itself, and secondly, because of the extent to which it influences, colors, shades U.S. relations with all of Latin America and parts of Europe even.

I also wanted to refer to something, an exchange that you had with Congressman Berman before I start off with my testimony. You congratulated Congressman Berman for his leadership on this issue and suggested that you agreed with him in good measure but that you had been slow in really taking up the cudgel in pursuing this.

Frankly, I think that is precisely the problem with this issue. There are many people in Congress who think there ought to be a change in U.S. policy towards Cuba but they have remained relatively silent. They haven't been involved in the issue.

Time and time again, I talk to people in the administration and, in fact, they are very fearful of taking any initiatives because when they do, those in Congress that have paid special attention to Cuba are likely to begin to savage them. In other words, there is just no support in Congress yet, no active support, for a more moderate policy, and so it has essentially been turned over to the extremes, which essentially hinders any kind of change in the executive branch.

I think that it is important that people like you, Senators like you with your views, and Congressmen, begin to take more initia-

tive. If not, we are not going to get very much change from the executive branch, I fear.

Let me say what kind of change I would like to see. Fundamentally, I would like to see the U.S. policy toward Cuba move from a policy of trying to radically change the regime, to get rid of Fidel Castro in one blow, to a policy that promotes incremental change in Cuba over time, that we begin to actively bargain for political and economic openings with the Cuban authorities rather than simply passively waiting for the regime to collapse.

Let me just say that this policy of incremental change in Cuba, from my point, has five strong arguments in its favor. What do I mean by incremental change? The kind of changes that are now occurring to some degree in Cuba, the opening of free markets in agricultural products, the allowing of Cubans to trade in dollars, gradual openings.

Why do I want to see this kind of incremental change? First, the United States itself stands to gain a great deal from negotiating specific, concrete accords on certain issues, as we saw with the recent negotiations on immigration issues. There are things to be gained by sitting down and talking.

Just recently, the Dialogue sponsored a meeting on environmental issues in United States-Cuban relations, for example. One of the things was the coral reefs in Florida. This is a small issue but an important one. They are slowly deteriorating because of some problem with microorganisms coming from Cuba. We are now going to spend $10 million, the U.S., to protect those coral reefs in Florida without taking into account that they are being damaged by the flow of microorganisms from Cuba because Cuba is considered hostile territory. This makes no sense at all.

Second, and most important, perhaps, for me in some ways, is efforts to promote modest changes in Cuba can reduce the suffering of the Cuban people. Frankly, our policy of embargo medicine and food to Cuba, is a cruel policy. It is virtually the only embargo that we have ever had on any country that prohibits the sale of food and medicine. Whether Iraq, Iran, Panama, Haiti, we have always allowed the sale of food and medicine.

The third change in policy toward a more incremental policy would allow immediately far greater cooperation with other Latin-American countries that share our objectives in Cuba but simply reject the kind of tactics we employ.

Fourth, even modest changes in Cuba's political and economic arrangements, and this is most important, should eventually reduce the violence, the trauma when the time comes for more fundamental change. We should make no mistake. Cuba will eventually be a democracy. It will eventually be a market economy. The question is, how sharp, how deadly, how violent that change is going to be. If we start now with gradual changes, that change may be less turbulent, less violent, less bloody.

And fifth, small changes, incremental changes, as we have seen in so many parts of the world and so many places, begin to accumulate and they can lead to larger, more profound changes, which is what we really all want in Cuba. Thank you.

[The prepared statement of Peter Hakim follows:]

PREPARED STATEMENT OF PETER HAKIM

I appreciate this opportunity to discuss US policy toward Cuba before the subcommittee. I will be presenting my own views here, but these closely parallel the recommendations of the Inter-American Dialogue's Task Force on Cuba as presented in its report of October 1992 and updated with a public statement released last month. I would like both of these documents to be included in the record.

The central question the US policy toward Cuba is whether our efforts should be aimed at removing Fidel Castro from power or whether they should be directed to promoting incremental changes in Cuban politics and society—whether we should be actively bargaining for political and economic openings with the Cuban authorities or waiting for the regime to collapse.

For most of the past 35 years, US policy relentlessly pursued—but failed to achieve—the ouster of Fidel Castro. And there is no reason to believe that this can be accomplished any time soon, even though his regime has never been weaker than it is today. It may now be the moment for Washington to shift course, to undertake a policy of encouraging incremental change in Cuba. We can do so by initiating negotiations with Havana on the issues that divide the two governments by promoting the free exchange of ideas, information, and people between the two countries: and giving new emphasis to humanitarian objectives in our relations.

Besides being easier to accomplish, a US policy to achieve incremental change in Cuba has five arguments in its favor:

First, the United States stands directly to gain from negotiating accords on certain specific issues. as the recent accord on immigration made clear. Both sides would also benefit from agreements to interdict drug criminals. to improve weather forecasting, and to protect environmental resources.

Second, efforts to promote modest changes can reduce the suffering of the Cuban people, many of whom need the remittances of their relatives and humanitarian shipments of food and medicine. It is cruel to deny Cubans family visits and easier communication with their friends and relatives in the United States.

Third, the proposed policy shift would allow immediately for cooperation with other Western Hemisphere governments, virtually all of whom share our objective of promoting democratic change in Cuba, but flatly reject the means we employ. US policy toward Cuba is more unilateral than it is to any other country in the world.

Fourth, even modest changes in Cuba's political and economic arrangements should help to reduce the turbulence and the prospects for violence when the time for more fundamental transformation arrives. Such changes, moreover, would begin to establish a minimal foundation for future democratic rule and economic progress.

Fifth, small changes—as we are seeing in so many parts of the world—do accumulate and can lead to larger, more profound changes, which is what we all want for Cuba.

But, I can hear the question, isn't this the wrong time to consider a major change in US policy toward Cuba? Aren't Fidel Castro's days already numbered? Why negotiate now? Won't that give him breathing space and prolong his rule? The fact is that it is fanciful to try to predict when Castro will leave power, and no serious policy can be based on such a prediction. Encouraging incremental change makes sense whether he departs next week or finds a way to stick around for another decade or two.

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INTER-AMERICAN DIALOGUE

TO WASHINGTON AND HAVANA: CHANGE COURSE

*A statement of the Inter-American Dialogue's Task Force on Cuba*

August 26, 1994.

The Inter-American Dialogue's Task Force on Cuba calls on the governments of the United States and Cuba to take immediate steps to defuse the present crisis in their bilateral relationship. We urge the two governments to turn away from confrontation and begin to negotiate the issues that divide them.

The Cuban government should not encourage its citizens to violate US immigration laws, nor should it promote or threaten an uncontrolled flow of Cuban refugees to the United States. It should order its security forces to stop actions that endanger the lives of those who do flee. We urge the Cuban authorities to confront the prob-

lems that motivate refugee flight: violations of human rights, repressive politics, and failed economic policies.

The US government should not inflict added hardship on the Cuban people, isolate them further, or reduce their already limited access to ideas and information from outside of Cuba. We urge the Clinton Administration to reverse its decisions to curtail remittances to the island and cut back on charter flights. These actions mainly punish ordinary Cubans (and thereby increase the incentives for flight) without affecting Cuban government policies.

We call on both governments to make full use of existing agreements to immediately address the current crisis:

- The 1984 migration accord offers the best approach to facilitate legal Cuban immigration into the United States. The two governments should agree to the United States posting an adequate number of consular offices in Havana to expedite the processing of immigrant visas.
- The 1973 hijacking agreement provides a framework for discouraging and punishing piracy and other illegal acts of violence. Both governments need to clarify their understanding of the agreement and their policies for implementing it.
- The US Coast Guard and the Cuban Border Guards should revive their substantive discussions and operational collaboration. Everything possible should be done to prevent the loss of life in the Florida Straits and comply with international law on the high seas.
- The US government should reiterate its pledge not to use military force against Cuba.

In its relations with Cuba the Clinton Administration building on the policies of presidents Nixon, Carter, Reagan, and Bush has consulted on migration, upheld the law against terrorist acts launched from US territory, fostered cooperation between the coast guards to enhance safety and combat drug-trafficking, and reassured Cubans that the United States has no hostile intentions or plans for military attack. The Cuban government, for its part, has responded positively to each of these initiatives. We urge the authorities of both countries to build on these precedents and seek a constructive solution to the present crisis—one that prevents harm to the lives of ordinary Cubans and Americans, reduces the risks of international confrontation, and contributes to peaceful change in Cuba.

These steps, in turn, should be the start of a thorough reassessment by both governments of their relationship. Recent events highlight the inadequacy of US policy toward Cuba, which has not been effective in promoting constructive change in Cuba. During a period of increasing cooperation in US-Latin American relations. the policy remains out of step with that of other hemispheric governments. The present situation calls attention as well to the political and economic failures of Cuba. By resisting reform, Cuba's government endangers its citizens and risks even graver crises. It is time for the two governments to negotiate a new relationship.

Senator SIMON. Thank you very much.

Dr. Torres?

## STATEMENT OF ALICIA TORRES

Ms. TORRES. Thank you, Chairman Simon.

In a way, it is ironic that I would appear before a U.S. Senate subcommittee to talk about family travel. You see, for the past 17 years, it has been the Cuban Government, not the U.S. Government, that has restricted family contact. As of last August 20th, however, President Clinton announced that we are no longer allowed to travel, to visit, and to assist our relatives in need in Cuba.

Just how bad are things in Cuba? The situation is critical. Thirty-five percent of pregnant women and 50 percent of babies are anemic. The mortality rate in nursing homes last year doubled. Milk is only available for children until 5 years of age. Shortages of soap, detergents, and chlorine has spread diseases in epidemic proportions throughout the island. Medicines and all kinds of medical supplies are scarce.

I know it is hard to do, but I would like for you please to imagine what your response would be if you were suddenly told that it is illegal for you to continue to assist your relatives living under these conditions and that you were no longer able to travel and hug your mother, your grandparents, your brothers, and your sisters.

Many of our relatives are lawyers, doctors, and professionals like you, me, and many people in this hearing room. I had one woman call my office who said, not even God himself can tell me I cannot travel to see my mother.

Unfortunately, for the past 30 years, both the U.S. and the Cuban Government have used humanitarian issues in their foreign policy moves against each other. For the past 17 years, Cuba has wanted to minimize the political, social, and ideological impact that family travel has had and has severely restricted the contact. In the case of Cuban-American family travel, the contact is even more direct with the family member staying in people's homes.

On August 19, President Clinton attended a meeting with the Florida delegation to examine the United States' policy response to the immigration crisis. The delegation included a number of representatives of some extreme groups within the Cuban-American community who recommended that the United States end family travel and assistance. In one night, the President reversed 17 years of U.S. policy.

Let us examine this policy debate. Cuba, in their attempt to reinsert into today's changed world, has opened up its policies of travel. They have increased family visas from 200 per week to approximately 2,000 per week in recent months. Travel outside the country has also been legalized, and practically anyone can buy a tourist visa and enter the country from numerous locations.

These changes have been welcomed by our allies. Cuban dissidents and human rights activists have also supported these changes, arguing that it provides political maneuvering space for them to have more contact with the outside world.

But these changes threaten the sector of the exiled community. You see, a peaceful transition may leave them out of the political future of the island because it will occur with the younger generations living in Cuba. Those older generation Cuban exiles who hope to someday rule over the island feel that a violent scenario enhances their possibilities. They want to create so much internal pressure in the country that the country explodes.

This is why they have wanted to end family travel and assistance. These exile groups have unsuccessfully attempted since the Carter administration to have every administration end family travel. Congress has also protected family travel. A review of the Cuban Democracy Act debate and the legislative history will show that Congress has protected family travel.

Then how was this policy change sold to the White House? Hardline Cuban-Americans argue that the administration's restrictive immigration measures were hard on the Cuban people, not the government. In direct contradiction, however, the Treasury Department official who announced the new regulations stated that they expected to affect only 1.5 percent of Cuba's GNP. One could hardly argue that that strikes a blow at the government and not the people.

It seems the White House was under the impression that this new measure would help appease Cuban-Americans upset about the immigration measure and it would help Governor Chiles win the reelection against Republican Jeb Bush. Instead, the immigration and travel measures have successfully alienated two different constituencies in Miami, those that oppose any relations with Cuba and the more moderate sectors with close relatives in Cuba.

Contrary to popular belief, diversity exists among Cuban-Americans. The most recent Florida International University poll found that 77 percent support family reunification.

What is the impact of the new policy on Cuba? In the short term, it has cut off thousands of people's ability to buy essential goods.

In the medium term, law-abiding Cuban-Americans are faced with the option of either upholding the new United States law or upholding decent family religious values. Undoubtedly, many will opt for finding some way of helping and being near their families in times of need. Many Cuban-Americans feel that they have no other option but than to find some third party to send the money and to find some third country that would allow them to travel.

Senator SIMON. Could you summarize the balance of your statement?

Ms. TORRES. Yes; you had asked me also when we met earlier to discuss the question of how the measures are being implemented, and if you would just allow me quickly, there has been a problem in terms of the Treasury Department's implementation of the new regulations.

There has been strip-searching of elderly Cubans who are returning to Cuba. The money that they are returning to Cuba to try to make ends meet has been confiscated. This practice happened on every one of the flights towards the end of August and in September. It is my understanding that it has subsided, however, that it is still being maintained. I think that this creates a problem as to the image that these visitors take with them from the United States.

The second point that I would like to make is that we are having a problem with the issue of a first amendment freedom of speech in Miami. America's Watch has done a report for the first time in its history. There have been bombings of homes and businesses of Cuban-Americans who support negotiations. There have been threats to Congressmen who have supported negotiations this year. We would recommend that Congress look into this issue.

[The prepared statement of Alicia Torres follows:]

PREPARED STATEMENT OF ALICIA M. TORRES

INTRODUCTION

I would like to thank Chairman Simon and other Subcommittee members for this opportunity to testify on our government's recent elimination of Cuban Americans rights to travel. It is ironic that I would appear before the U.S. Senate's Subcommittee on the Constitution—you see, for the past 17 years it has been the Cuban government, not the U.S government, that has restricted contact between families on both sides of the Florida Straits. As of last August 20, however, President Clinton announced that we are no longer allowed to travel to visit and assist our relatives in need in Cuba.

Putting aside political ideology—Cuban Americans are increasingly concerned about the well being of our relatives in Cuba. Just how bad are things in Cuba?

The situation is critical:

In February 1993 UNICEF reported that 50 percent of the babies between 6–12 months and 35 percent of pregnant women were suffering from anemia;

In mid 1993 the mortality rate in nursing homes was two times higher than the year before;

There are only milk rations available for children up to the age of 5 years old—milk productivity fell 55 percent 1992 compared to 1989;

The drastic drop in nutrition has given rise to a number of diseases that Cuba either never knew before or had not seen in many years—the Epidemic of optic neuritis this year has afflicted over 45,000 Cubans, for example.

Agricultural production has been severely reduced due to the lack of fertilizers and fodder imports;

Shortages of soap, detergents and chlorine and electrical power to purify water facilitates the spread of disease;

The American Public Health Association recent fact finding delegation to Cuba found that the lack of eye glasses has already begun to affect school children's ability to learn;

Medicines of all kinds and medical supplies are scarce—its hard to find some one in the Cuban community who has not heard first hand horror stories about their relatives and hospitals and the lack of medicines.

I know it is hard to fathom—but please try to imagine what your response would be if you were suddenly told that it is illegal for you to continue assisting or even to be able to see and hug your mother, your grandparents, your father , your brother or your sister. You need only remember the faces of the people on the rafts that were on our T.V. screens every night last month to imagine the effect of the economic crisis in Cuba. Many of these people are lawyers, doctors, and professionals, like you, me, and others in this hearing room today.

I had one woman call my office who said "not even God Himself, can tell me I can not travel to see and help my mother?" Unfortunately for the past thirty years both the U.S. and the Cuban government have used humanitarian issues as cards in their foreign policy moves against each other.

Despite repeated efforts by some extreme groups in the Cuban American community to eliminate family travel and assistance—every Administration since the Carter Administration has upheld the right to travel to visit relatives and the right of Cuban Americans to assist their family in Cuba. A review of the legislative history of the Cuban Democracy Act will show that also Congress intended to protect family travel.

During these past 17 years, it has been Cuba that has restricted travel—wanting to minimize the political, social and ideological impact of contact with relatives in the U.S. Studies have shown that all societies that develop tourism experience a sociological impact. In the case of Cuban American family travel, the contact is even more direct with family members arriving and staying in peoples homes.

The Cuban American Committee Research and Education Fund was formed during the Carter years. We participated in the negotiations around family reunification issues. Since that time, we have advocated that both governments discontinue the use of humanitarian issues as cards in foreign policy with each other. We have supported negotiating our differences and dialogue.

With respect to family travel, our struggle has been with the Cuban government. Hardliners in Cuba have blamed family contact for a number of social problems throughout the years and periodically have eliminated or restricted the number of visas they grant for family reunification. Despite these fluctuations, hundreds of thousands of families have been reunited during the past 17 years.

On August 19, President Clinton attended a meeting with a Florida delegation to examine U.S. policy response to the immigration crisis. According to press accounts, the Florida delegation, which included representatives of extreme sectors of the Cuban American community convinced the President to deviate from the Cuban Democracy Act and from the long standing humanitarian policy of encouraging family travel, contact and assistance. In one night, the President reversed 17 years of U.S. policy. This is what brings us here to you today.

## LET US EXAMINE THIS POLICY DEBATE

In Cuba, since the collapse of socialism—economic need has been the driving force behind a number of reforms. One may argue and disagree as to how vast, significant or far reaching the reforms have been; but, no one argues that indeed changes have

begun. With respect to travel and family contact, economic necessity has won over political risk concerns: the Cuban government has decided during the past couple of years to liberalize restrictions on travel to and from Cuba.

- The granting of visas to visit relatives in Cuba have increased from approximately: 200 per week to approximately 2000.
- Travel outside the country was previously restricted to only the elderly and all Cubans who chose to leave and work outside of Cuba lost their residency status and could not return to Cuba for at least 5 years. Now, all Cubans can travel outside the country and Cuba is granting residency status to those who choose to live and work outside of Cuba allowing them to return whenever they please.
- Tourist travel to Cuba, previously severely restricted, is now easier than ever. Anyone can buy a tourist visa and enter the country from numerous locations.

These changes have been welcomed by our allies in Latin American and elsewhere. Cuban dissidents and human rights activists have also supported these changes arguing that it provides greater political maneuvering space for them and enhances the possibility of a peaceful transition in Cuba.

But these changes threaten a sector of the exile community—you see a peaceful transition may leave them out of the political future of the island because it will occur with younger generation Cubans living in Cuba today. Those older generation Cuban Americans who hope to someday rule over the Island, feel that a violent scenario enhances their possibility. They promote what is called in Miami the "pressure cooker theory"—create so much internal pressure in Cuba that the country explodes.

These exile groups have unsuccessfully attempted to have the Bush and the Clinton administrations as well as Congress prohibit family travel. The Clinton administration, however, has repeatedly cited the Cuban Democracy Act's protection and even promotion of family contact to authorize increased Charter services.

HOW WAS THIS POLICY CHANGE SOLD TO THE WHITE HOUSE?

According to press accounts and interviews of those present at the meeting, hardline Cuban Americans argued that the administration's restrictive immigration measures were hard on the Cuban people, not the government. They forcefully recommended that the President also strike a blow at the Cuban government by eliminating the revenues of family travel and assistance and cease granting tourist visas for Cubans to visit relatives in the U.S.

In direct contradiction, however, the Treasury Department official that announced the new regulations stated that they expected to affect only 1.5 percent of Cuba's GNP. One could hardly argue that this strikes a blow at the Cuban government—but is does definitely strike a blow at the hundreds and hundreds of elderly persons that depend 100 percent on the $100 a month they receive from their family to buy food and other essential goods.

It seems the White House was under the impression that this new measure would help appease the Cuban Americans, upset about the immigration measures, and it would help Governor Chiles win the re-election against Republican Jeb Bush. Instead, the immigration and travel measures have successfully alienated two constituencies in Miami—those that oppose any relations with Cuba and the more moderate sectors with close relatives in Cuba who frequently travel to visit their families and regularly send assistance.

DIVERSITY AMONG CUBAN AMERICANS

Contrary to popular belief, diversity exists among Cuban Americans. The Florida polls have consistently shown the Cuban American community divided on issues of negations with Cuba. The polls have found, greater support for resolving such issues that impact on our ability to maintain contact with our relatives—family reunification, telephone communications and medicines and foods.

The most recent Florida International University public opinion poll found the respondents divided in almost equal parts in support of a dialogue with the Cuban government (43 percent). They found greater support for resolving issues that impact directly on our relatives (77 percent support family reunification; 52 percent telephone communication; 50 percent favor excluding medicines from the embargo).

The poll found support for more moderate policies consistently higher among the younger generations—almost four times more support for the lifting of the embargo among the younger generations than among the older than 45 year old generations, for example (40 percent compared to 11 percent). The generations that have grown up here, are more in tune with the rest of the country in supporting negotiations rather than confrontation with Cuba.

WHAT IS THE IMPACT OF THE NEW POLICY ON CUBA?

In the short term—it has cut off thousands of people's ability to buy food and medicines and other essential goods. Most people did not spend the dollars they received from their relatives to buy goods in the expensive government stores, they use their money in the countryside to buy from the farmers—stimulating the move towards farmers markets.

In the medium term—law-abiding Cuban Americans faced with the option of either upholding the new U.S. law or upholding decent, family, religious values will opt for finding someway of helping and being near their family in times of need. Many Cuban Americans undoubtedly feel they have no other option than to find a third party to send assistance and to travel through a third country.

There always seems to be someone ready to make money off human crises. Unfortunately today it is our government responsible for the third country companies that are beginning to charge outrageous rates to send family assistance to relatives in need in Cuba. Re-routing travel to visit relatives will also be much more expensive for Cuban Americans.

We should have learned our lesson from telecommunications. Cuba has economically benefited more from the Canadian companies that re-route telephone calls than they would have from U.S. companies providing direct service. The Treasury Department has not been able to shut down these third country telephone companies charging inordinate amounts. Our policy has made some third parties rich at the expense of a humanitarian need to communicate with our relatives. After several years of this abuse, the State Department finally seems to be about to authorize U.S. companies' direct service between the U.S. and Cuba.

Up until now, the Treasury Department has strictly regulated licensed Charter and Financial businesses with Cuba. Third country re-routing will make the sending of money and travel more expensive for Cuban Americans. Cuba will surely benefit more than doing business with Treasury Department regulated businesses. Part of the third country travel will most likely occur on Cubana Airlines, the national Cuban airlines, for example, rather than on United Airline Charters. As happened with third country telecommunications, the new U.S. restrictions on sending of aid and travel will be difficult if not impossible to enforce.

HOW IS THE U.S. GOVERNMENT IMPLEMENTING THE POLICY CHANGES?

The new Treasury Department OFAC regulations provide for individual travel licenses in extreme humanitarian cases. OFAC has said that they are responding to applications in about 2 weeks. But life is critical for all people in Cuba today. Travel to visit and assist relatives is all humanitarian. In the words of one Cuban American, "I don't just have the right to travel to see my mother die, I have the right to 'travel, and be by her side while she is still well and can celebrate upcoming birthday's."

Visas for travel to the U.S. to visit relatives have also been eliminated. Furthermore, Custom officials have been strip-searching elderly Cubans returning to Cuba from the U.S. on tourists visas. Horror stories abound in the Cuban American community of systematic strip-searching of old ladies and men at the Miami airport and confiscating the money that they were returning to Cuba with to help make ends meet. This practice is not only immoral and inhumane, but goes against all the values that those of us who grew up in this country were taught to believe in. Although it is our understanding that this practice has subsided in the last few weeks—it is none-the-less still being implemented.

What kind of image of the United State are these visitors returning to Cuba with? What could a family in Cuba feel about the U.S. government if we attempt to cut off their means of buying medicines and foods? Which country is being perceived as the totalitarian, anti-humanitarian country? And last but not least: what foreign policy objectives could we possibly be pursuing?

Not only are we violating what we believe to be our constitutional right to freedom of travel. All U.S. citizens should have the right to travel freely. These most recent measures—dividing Cuban families and strip-searching elderly people are but an extreme example of how absurd our policy towards Cuba has become. We have subjected larger foreign policy interests to domestic political concerns—violating rights of citizens to promote the special interest of one extreme sector of the Cuban American community that has a political agenda—not to reform Cuba, but rather to create violence so that they can increase their chances of taking over the country.

How much longer can this go on?

CUBAN AMERICAN POLITICAL INTOLERANCE

You should understand that there is a history of political intolerance in the Cuban American community. Many who came to the U.S. left Batista's dictatorial regime and never learned the values of First Amendment in the U.S. Violence and intimidation is a way of life in Miami. For me to say the things I have said today can result in threats of violence against me and my family. Even Congressmen who have called for negotiations with Cuba have been threatened this year. Just a few weeks ago, the offices of a respected magazine whose owner supports negotiations with Cuba was bombed.

The situation has been so critical that American's Watch for the first time produced a report on a U.S. city, Miami. They are currently updating it.

Very soon we face the problem of the Latin American Summit being held in Miami. The rest of the world does not see eye to eye with the United States on our continued sanctions of Cuba. There have been repeated votes in international forums that oppose U.S. sanctions against Cuba. Cuba has trade relations with over 85 countries. Numerous multi-million dollar joint ventures with Mexico have recently been announced. Just this week a major 500 million dollar joint venture with Israel was announced.

There have been demonstrations in Miami in front of the consulates of Cuba's trade partners. The Administration wants to keep Cuba "off" the agenda during the Summit meeting, but the fact that the meeting is being held in Miami makes this practically impossible. You saw how some of the extreme exile groups chained themselves to the Cuban Mission doors during the recent immigration negotiations. There are already calls in Miami for a 200,000 persons demonstration in protest of Latin American countries' economic relations with Cuba during the Summit.

How much longer will this minority's position and narrow political agenda be allowed to infringe on the greater foreign policy objectives of the country; and to infringe on the rights of the majority of U.S. population. Continuing to squeeze the country until violence breaks our will not advance the prospects for democracy. Last months immigration crisis is but a preview of what would happen if indeed war breaks out in Cuba.

OPPORTUNITY FOR ANOTHER APPROACH

We did not embargo Eastern Europe or the Soviet Union. We opt for engaging China, not isolating and embargoing it, to encourage improvements in their human rights record. Unlike Cuban Americans, immigrants from former socialist countries to the U.S. have not been subjected to restrictions that inhibit maintaining relations and assisting relatives and loved ones. We need a more humane foreign policy. Humanitarian issues should not be used as cards in foreign policy by either government.

Cuba is not Haiti or South Africa where the internal leaders of the resistance and the international community support the embargoes of their countries. Leading human rights activists inside Cuba who have chosen to stay in Cuba to struggle for political change such as Elisardo Sanchez, Gustavo Arcos and Rolando Prats—all of whom have served time in Cuban prisons have appealed to the U.S. to ease tensions and lift the embargo so that they could have more political space inside Cuba to effectively organize a peaceful transition to democracy.

Policy makers seem to agree that the negotiations with the Cuban government on immigration issues have proven to be beneficial for U.S. interests. We have an upcoming meeting between U.S. and Cuban negotiators this month to review both sides implementation of the agreement.

- We should explore expanding the negotiations to discuss other points of mutual concern.
- If it is found that Cuba has been abiding by their end of the deal; then we should lift the last sanctions against family travel and assistance that were imposed as a response to the immigration crisis;
- Abiding by consensus that arose from the Cuban Democracy Act debate that communication and contact promote democratic values, we should continue the interagency process to write regulations that open up new categories of travel.
- The embargo of medicines and foods should be lifted.
- Finally, Congress should launch an over-due investigation into Cuban exile violence. America's Watch recently had this to say about the issue: "there is no public defense of the right to free speech or the right to dissent * * * no one at the local, state or federal levels has spoken out against the violence or threats against moderate voices."

These measures would move us in the direction of a more humane policy, one that would enhance the prospects of democracy; uphold our right to freely travel; and would help create the necessary atmosphere in Miami and among our hemispheric neighbors for the Latin American Summit.

Again, thank you for this opportunity and thank you for upholding our Constitutional right to speak freely. I hope it may contribute to the recognition of our rights to visit and assist our relatives in need.

Senator SIMON. We will enter your full statement in the record, as we will all the statements.

Professor Gray?

## STATEMENT OF MARY GRAY

Ms. GRAY. Thank you for the opportunity to testify.

I am a professor of mathematics and statistics at American University. I am also a lawyer. I chair the Human Rights Advisory Committee of the American Association for the Advancement of Science and I have worked on human rights issues with the AAAS, the American Mathematical Society, the American Statistical Association, and other organizations.

The view of the organizations with which I work is that restrictions on the travel of scientists is a serious abridgement of scientific freedom and, moreover, serves no useful purpose. This applies to the freedom of U.S. scientists to travel abroad, to the freedom of scientists from other nations to travel here, and to the freedom of scientists from other nations to be able to leave their own countries freely to participate in scientific activities.

Over the years, many scientific organizations have worked to that end. We have protested the inability of Soviet scientists to leave their country, the failure of the U.S. Government to grant visas to foreign scientists who have a legitimate scientific reason for visiting here, and, as we do now, we protest our own government's prohibition on our participation in the free exchange of scientific ideas.

I will cite just a single example to show the stifling and quite absurd effect of the current restrictions on travel to Cuba, which are essentially the same for scientists as they have been for a number of years. They have just gotten worse.

I should like to preface this description, however, with a general comment that we see no reason for singling out Cuba for the imposition of these restrictions on scientific freedom. At the height of the Cold War, the U.S. Government imposed no such restrictions on the travel of its scientists to the Soviet Union or in general to the countries of Eastern Europe. Currently, we may travel quite freely so far as the U.S. Government is concerned to China, whose form of government is certainly as repugnant to democratic principles as that of Cuba and whose human rights record overall, as well as with respect to scientists, is much worse.

Last fall, members of the American Mathematical Society were denied licenses to travel to Havana for the Second International Conference on Approximation and Optimization in the Caribbean. This was an international conference, cosponsored by Humboldt University in Berlin. The conference was certified by the International Council of Scientific Unions, known as ICSU, for which the United States' National Academy of Sciences is our adhering organization.

Almost as offensive to those who are committed to the concepts of scientific freedom and responsibility as the restrictions themselves are the way they are being handled. Government officials are making individual arbitrary and generally ill-formed judgments on the legitimacy of proposed scientific and educational activities. If the restrictions are to remain in effect, at a minimum, requests from legitimate scientific and academic organizations and requests concerning meetings certified by accredited bodies such as ICSU and its national affiliates should be approved automatically.

Particularly noteworthy as both irritating and incomprehensible is the fact that members of the American Association of Engineering Societies were granted travel licenses to attend a professional meeting in Cuba just a few weeks after the mathematicians were denied theirs. The rationale offered by the Department of State for their arbitrary and capricious decision was that in the schedule of the 4-day mathematics conference, ½ the day was designated as "free time", a customary practice in many international meetings.

Any scientist would know that such periods provide the opportunity for informal free exchange of ideas, so important to the advancement of science. The lawyer in the State Department decided, however, that this indicated that the conference was just a cover for recreational activities and that U.S. mathematicians would be going only for vacations on the beach, not for serious scientific purposes. In other words, the conference attended by scientists from all over the world in the middle of an academic term was just a cover for entertainment.

There is substantial concern in the scientific community about a government agency conducting prescreenings of professional activities of reputable scientific groups.

We believe that the actions of the U.S. Government in restricting scientific exchange and the free flow of information and ideas are inconsistent with the obligations the U.S. Government has assumed on the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and in agreements of the Conference on Security and Cooperation in Europe, known as the Helsinki Accords to which the United States is a signatory, and we would welcome Congressional action.

[The prepared statement of Mary Gray follows:]

PREPARED STATEMENT OF MARY W. GRAY

Thank you for the opportunity to testify concerning restrictions on travel to Cuba. My name is Mary W. Gray; I am professor of mathematics and statistics at American University, Washington DC. I chair the Human Rights advisory committee of the American Association for the Advancement of Science (AAAS); I have had extensive experience working on human rights issues with AAAS, the American Mathematical Society (AMS), the American Statistical Association (ASA), and other organizations. In addition to being a mathematician, I am a lawyer.

BACKGROUND

The view of the organizations with which I work is that restrictions on the travel of scientists is a serious abridgement of scientific freedom and, moreover, serves no useful purpose. This applies to the freedom of U.S. scientists to travel abroad, to the freedom of scientists from other nations to travel here, and to the freedom of scientists from other nations to be able to leave their own countries freely to participate in scientific activities. Over the years AAAS, ASA, AMS and many other scientific organizations have worked to that end. A selection of recent correspondence

with various government agencies on the subject of travel bans, as well as some press clippings, is attached as an appendix to this testimony. We have protested the inability of Soviet scientists to leave their country because they were not in favor with their government, the failure of the U.S. government to grant visas to foreign scientists who have a legitimate scientific reason for visiting here, and, as we do now, our own government's prohibitions on our participation in the free exchange of scientific ideas.

Although the focus in this hearing is on Cuba, I should like to point out that recently a Chinese mathematician attempting to travel to a mathematics conference in Minnesota was held in detention under quite deplorable conditions for a number of weeks; a mathematician who is a U.S. citizen had difficulty having his passport renewed, apparently because of problems dating to the McCarthy era; and a Canadian citizen encountered difficulties in trying to travel to a mathematics conference, apparently because of his having engaged in anti-Vietnam war activities. I say apparently? because among other absurdities the immigration authorities refused to disclose the nature of the alleged "blot" on his record that he was expected to remove by proving that it was no longer a problem.

We should like also to take this opportunity to point out that similar passport restrictions that were imposed on travel by U.S. citizens to Lebanon may no longer be justified as a means to protect citizens from potential danger, and therefore would be in violation of the freedom to travel principle.

## SPECIFIC EXAMPLES

I should like to cite three specific instances of the stifling and quite absurd effect of the current restrictions on travel to Cuba, which are essentially the same for scientists as they have been for a number of years. I should like to preface these descriptions, however, which a general comment that we see no reason for singling out Cuba for the imposition of these restrictions on scientific freedom. At the height of the Cold War the U.S. government imposed no such restrictions on the travel of its scientists to the Soviet Union or to the countries of Eastern Europe (with the exception of Albania). Currently we may travel quite freely, so far as the U.S. government is concerned, to China, whose form of government is certainly as repugnant to democratic principles as that of Cuba and whose human rights record overall, as well as with respect to scientists, is much worse.

1. Last fall members of the American Mathematical Society were denied licenses to travel to Havana for the Second International Conference on Approximation and Optimization in the Caribbean. This was an international conference, cosponsored by Humboldt University in Berlin. Mathematicians seeking to attend the conference were supported from a letter to the U.S. Department of Treasury from the U.S. National Academy of Sciences, as well as numerous letters from the AAAS,

The conference in Havana was certified by the International Council of Scientific Unions (ICSU), for which the United States National Academy of Sciences is the adhering organization. ICSU's guidelines specify that a meeting or conference is to be designated as a certified international scientific meeting if it is:

* * * arranged or sponsored by ICSU itself or by Scientific Unions, Committees or Associates of the ICSU family. In all such cases, by definition, scientific meetings must be open to any member of the international scientific community without discrimination, in accordance with ICSU Statute 5.

Almost as offensive to those who are committed to the concepts of scientific freedom and responsibility as the restrictions themselves are the way they are handled. Government officials are making individual arbitrary and generally ill-informed judgments on the legitimacy of proposed scientific and educational activities. If the restrictions are to remain in effect, at a minimum requests from legitimate scientific and academic organizations and requests concerning meetings certified by accredited bodies such as the International Council of Scientific Unions and its national affiliates should be approved automatically.

Particularly noteworthy, as well as both irritating and incomprehensible to mathematicians, is the fact that members of the American Association of Engineering Societies were granted travel licenses to attend a professional meeting in Cuba just a few weeks later. The rationale offered by the Department of State for their arbitrary and capricious decision was that in the schedule of the four day mathematics conference one half day was des-

ignated as free time, a customary practice in many international meetings. Any scientist would know that such periods provide the opportunities for informal free exchange of ideas so important to the advance of science. The lawyer in the Department of State decided, however, that this indicated that the conference was just a cover for recreational activities and that U.S. mathematicians would be going only for personal vacations, not for serious scientific purposes; in other words, the conference, attended by scientists from all over the world in the middle of an academic term, was just a cover for lying on the beach. There is substantial concern in the scientific community about a government agency—especially but not exclusively one with no scientific expertise—conducting pre-screenings of the professional activities of reputable scientific groups and member scientists, making judgments as to the legitimacy of their activities and the suitability of their travel.

If the concern is that Cuba will be unduly helped by the information picked up from U.S. scientists one would think that an engineering conference might be deemed a more "valuable" exchange than one on pure mathematics. This brings me to my own experience of several years ago.

2. I was invited by the Cuban Mathematical Society to give some talks in Havana. I dutifully went to the office in the Department of Treasury responsible for licensing. After asking about my reason for wanting to visit Cuba and about my background, they asked for a copy of my C.V., presumably to establish the legitimacy of my scholarly credentials. I was happy to comply with what appeared to be a reasonable request. On my C.V. at the time were listed approximately seventy books and articles that I have published; the person with whom I was speaking requested a copy of each of these and of any future publications that I might write, whether or not they might have anything to do with Cuba or with my visit there. I should mention that most of my publications are strictly mathematical or statistical although a few deal with such issues as academic freedom and economic equity and two are even about opera. I did *not* feel that this was a reasonable request.

It was then explained to me that the Treasury was anxious that no economic benefits accrue to Cuba as a result of the visits of U.S. scholars or researchers, and I was asked whether the research about which I planned to speak was of any value. You can see the dilemma—am I to confess that my life's work is of no value, or am I to be told that I may not have a license? I simply left the office, never to return.

My final example:

3. A Cuban nuclear physicist, Dr. R. Capote Noy, doing research work under contract with the International Atomic Energy Agency (IAEA) was denied the right to attend an IAEA meeting scheduled to take place in at Oak Ridge, Tennessee. The purpose of the meeting was to review the work and findings of Dr. Noy and other IAEA contractors doing research on related subjects. Because of the U.S. refusal to permit him to enter the country, the meeting was subsequently moved to Vienna. The actions of the U.S. government violated not only the human and professional rights of Dr. Noy, but our nation's obligations to an international agency whose assistance we seek in dealing with nuclear proliferation problems.

## CONCLUSION

At a meeting at the White House Office of Science and Technology Policy organized by the AAAS and other organization, representatives from a number of scientific organizations were informed by State Department officials that a major cause of the problems we have had was that it was impossible for them to understand exactly what Congress had in mind when they exempted "educational activities" from the travel ban. They encouraged us to ask Congress for a more detailed definition of the type of contacts and activities that should be exempted. As we have said in letters to a variety of Senators and Representatives, we believe that it is urgent that Congress provide more specific guidance to the Executive Branch that would make clear that educational and scientific contacts and exchanges should not be subjected to governmental control or restriction under any circumstances. Without a clear and comprehensive Congressional mandate, recent history suggests that the State and Treasury Departments will continue to follow policies and practices that undercut our obligation under the U.S. Constitution and international human rights standards to assure freedom of expression and travel with respect to Cuba.

We believe that the actions of the U.S. government in restricting scientific exchange and the free flow of information and ideas are inconsistent with obligations the U.S. government has assumed under the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and in Agreements of the Conference on Security and Cooperation in Europe (the Helsinki Accords) to which the U.S. is a signatory.

Since the AAAS Committee on Scientific Freedom and Responsibility was formed in 1976, the freedom to exchange information and ideas, and to maintain contacts with scientific colleagues around the world have been major focal points of our international human rights work. This is as true for restrictions that the U.S. government imposes on scientists and researchers seeking to meet and work in Cuba as other nations as it is for travel limitations imposed on scientists by the former Soviet Union and other countries. It makes it much more difficult for us to criticize travel restrictions imposed by repressive governments when we apply similar limitations ourselves for what we claim to be legitimate reasons. A far more rational approach is to refrain from using travel bans as a foreign policy instrument, and to maintain the right to travel in its proper place as a freedom established both under our own Constitution and international human rights law.

Senator SIMON. Thank you very, very much.

Mr. Du-Breuil?

## STATEMENT OF GEORGE J. DU-BREUIL

Mr. DU-BREUIL. Good afternoon, Mr. Chairman and members of the subcommittee. As a Cuban-American and board member of the Cuban Committee for Democracy, I thank you for the invitation to offer testimony on the topic of the constitutional right to international travel before this committee.

Let me start by making an echo of Dr. Peter Hakim's remark about the concern about the need for more members of Congress becoming more involved in the issue of Cuba That should really establish some balance.

The Cuban Committee for Democracy is an organization comprised predominantly of Cuban-Americans and others who look forward to a peaceful transition to democracy in our country of origin. Our basic view is that a transition to democracy in Cuba is a Cuban problem that should be solved through dialog among Cubans of all political persuasions on the island and in exile. Nonetheless, we welcome the assistance that others might lend us in achieving a peaceful resolution to our current predicament.

The original travel ban was the product of two historical factors, the general embargo imposed in 1962 by the Kennedy administration after the Cuban Government confiscated American property on the island, and Cuba's alignment with the former Soviet bloc.

During the Carter administration, this travel ban was lifted. Soon thereafter, the Cuban Government allowed family reunification visits for the first time since the early 1960's. By the end of the 1970's, Cuban-Americans were thus visiting their relatives on the island on a regular basis, as Dr. Torres mentioned.

In 1982, the Reagan administration banned Americans from spending money in Cuba unless they had family, professional, or humanitarian reasons for traveling to the island. The new regulations did not affect the right of Cuban-Americans to visit relatives. More recently, the Cuban Democracy Act of 1992, which tightened the embargo considerably, did not interfere with family reunification visits.

All this changed on August 20th of this year. Amidst the immigration crisis precipitated by the Cuban Government, President

Clinton closed down the charter flights that regularly carried travelers in both directions across the Florida straits. The rationale was to limit even further the Cuban Government's sources of hard currency and thus exert additional pressures in favor of free elections and a market economy.

The Cuban Committee for Democracy does not agree with this rationale. Engagement, communications, and openness to the West made a significant contribution to bringing down communism in the Soviet Union and Eastern Europe. We believe that the same can happen in Cuba.

Today, however, the issue is not the character of U.S. policy towards the Cuban Government but rather whether that policy requires the violation of one of our fundamental rights, the right to choose where and when we want to travel and whom we wish to visit. The fifth amendment to the Constitution protects this basic right and the United Nations includes it in the Universal Declaration of Human Rights.

In the event of war, a government may indeed invoke the greater interest of national security to restrict its citizens' right to travel. Remarkably, during the Cold War, Americans were free to visit most countries behind the Iron Curtain. Would traveling to Cuba today pose a greater danger to U.S. national security than traveling to communist countries did at the height of the Cold War?

The fact that for a longtime, Cuba attempted to undermine the democratic regimes in Latin America have well justified the efforts of the U.S. Government, including the travel ban, to isolate its actively hostile neighbor. But times have changed dramatically. The Cuban Government has stopped interventions abroad. Most Latin-American Governments have reestablished relations with Cuba. Last month, the Rio Group once again called on the United States to reconsider its foreign policy toward Cuba.

The Soviet empire has disintegrated. The United States recognizes China as a country with most favored nation status for purposes of commerce. The embargo on Vietnam has been lifted. The United States is actively negotiating with North Korea. So much for communist countries. Preventing American citizens from visiting Cuba can no longer be legally justified and has become a glaring anachronism in current U.S. foreign policy.

In light of these facts, to deny Cuban-Americans our right to visit our relatives on the island can only be seen as a misguided attempt to prolong and tighten a policy that is obsolete, illegal, and inhuman. The historical reasons that may have once justified this policy are no longer valid. The travel ban violates the spirit of the Constitution. This ban is inhuman because Cuban families have been separated and suffered for too long. Now the Clinton administration is contributing to further this separation and suffering.

Let me finish with one living paradox. I brought here with me to this hearing my brother-in-law, who is visiting here from Cuba. This is the paradox. I live in a democracy. I cannot go to visit him. He lives in a dictatorship. He is here visiting me and my family.

Senator SIMON. That is a paradox. Thank you, Mr. Du-Breuil.

You also used the example of Vietnam. I think in both the case of Vietnam and in the case of Cuba, we acted in response to the national passion, not the national interest. What happened in Viet-

nam is very clear. The Japanese, the Taiwanese, the French, and others moved in and got a lot of business from the Vietnamese that our businesses could have received.

I am from Illinois. Caterpillar and Amoco, two major Illinois corporations, wanted to do business in Vietnam. They could not. There was no security interest here. It was simply kind of a knee-jerk reaction to a political situation.

The fact that we have opened up trade does not mean we approve of the government that is in Vietnam. It is a dictatorship. I think the analogy to Cuba is very real.

Let me ask Mr. Du-Breuil and Dr. Torres both, because I have to say, and this is true in Illinois, my contacts with the Cuban community outside of Illinois suggest that the viewpoint that you expressed is probably a minority viewpoint in the Cuban community today. Is that correct or is that not correct?

Mr. DU-BREUIL. I am not sure. There are a lot of issues involved in the relations between the United States and Cuba. As Dr. Torres expressed, 77 percent of Cubans nowadays are in favor of family reunification and maintaining this constant communication.

Senator SIMON. Where do you get that 77 percent?

Ms. TORRES. It is from the Florida International University polls from Dade County, and they are looking at just Cubans who live in Dade County, which is about 50 percent of the Cubans.

Senator SIMON. But probably typical of the Cuban-Americans generally?

Ms. TORRES. No, because all the other polls of Cubans outside of Miami show that they are much more in tune with the rest of the country, much more integrated into the other—the political, the more moderates outside of Miami.

No, the Florida International University poll is just the Cubans who live in Dade County. Seventy-seven percent support family reunification. I have some of the figures in my testimony there from that last poll, but it is clear that every poll has shown diversity. This does not mean there is support for the government, and it does not mean——

Senator SIMON. No, I understand.

Ms. TORRES. In terms of negotiations with Cuba, almost all the polls have shown the Cuban community divided into equal parts, in favor and opposed to negotiations with Cuba.

I would just like to add, my father voted for George Wallace and he is very concerned about our relatives in Cuba and about the medical shortages and everything that is happening there, so it is not something that cuts across ideological definitions—I mean, something that does cut across ideological definitions.

Senator SIMON. Mr. Du-Breuil, let me ask you this question. Who benefits by our present policy?

Mr. DU-BREUIL. I agree with the point that Dr. Torres was making. There is a minority of Cubans who are very involved in what we call the anti-Castro industry.

Senator SIMON. With all due respect, you have not answered my question. Who benefits from the present policy?

Mr. DU-BREUIL. I thought I had answered your question. I think that our present policy, unfortunately, is practically dictated by an organization that is very strong in terms of a tradition instead of

a fantastic work of organization and strength. They have sold themselves for many years as the spokes people for the whole Cuban exile. I think that is not so anymore. In the past few years, there have been a number of other organizations like the Cuban Committee for Democracy that are trying to neutralize that view.

Senator SIMON. I understand. I guess, if I may answer my own question, I understand your point is about who is dictating policy. My point is that the ban on travel really benefits no one. It hurts the United States. I think it hurts Cuba. We all lose in that process.

Professor Gray, you made a good point that when we faced nuclear confrontation with the Soviet Union, we didn't stop travel back and forth between the Soviet Union and the United States. In your written testimony, let me just read into the record what you had to say here.

"I was invited by the Cuban Mathematical Society to give some talks in Havana. I dutifully went to the office in the Department of Treasury responsible for licensing. After asking about my reason for wanting to visit Cuba and about my background, they asked for a copy of my resume, presumably to establish the legitimacy of my scholarly credentials. I was happy to comply with what appeared to be a reasonable request."

"On my resume at the time were listed approximately 70 books and articles that I had published. The person with whom I was speaking requested a copy of each of these and of any future publications that I might write, whether or not they might have anything to do with Cuba or with my visit there."

I think here we are talking about someone who is looking at content, not just whether you, in fact, are a scholar—and I have to say I am impressed by 70 books and scholarly articles, Professor Gray—but here I am drawing a conclusion. What was your impression?

Ms. GRAY. My impression is either they were looking for people whose views they thought were contrary to what the administration at that time thought were appropriate or they were a bunch of petty bureaucrats who had nothing better to do than read mathematical articles.

Senator SIMON. But let us assume it was the former. In a free country, do we have any right to say to Americans, because you express a view that is contrary to the administration's view, whatever the administration is, you cannot travel to a certain country?

Ms. GRAY. I would not think so, and I am very sorry that in the case of Cuba it seems to be the case.

As you said, travel to the Soviet Union has never been restricted on our part. Travel to China is not restricted on our part. I see no purpose in singling out Cuba, and frankly, I see no purpose in travel restrictions in any case. It simply is a first amendment restriction. It is a restriction on scientific freedom and it violates our treaty obligations.

Senator SIMON. And you find it personally offensive, I gather?

Ms. GRAY. And I find it personally offensive as well, indeed.

Senator SIMON. I do, too. I just think it is incredible.

Mr. Hakim, you talked about incremental changes, and real candidly, I would vote for travel. We not only recognize China, we give

them most favored nation status. It is a dictatorship that is certainly as harsh, and I think you can make the case, harsher, than the dictatorship of Castro.

But you said we have to do this incrementally, and I think that is correct. It occurs to me the incremental change that might take place is clear establishment of the right to travel, and second, the ability to sell food and medicine. We do that with Iraq, as one of you, I think it was Dr. Torres, mentioned. I don't think even the most militant anti-Castro person would say that Castro is as harsh a dictator as Saddam Hussein.

That seems, to me, a reasonable incremental first step. Am I correct? And incidentally——

Mr. HAKIM. I would say one more step, also, that we agree to sit down with the Cubans and begin to discuss some of these issues. It seems to me one other step that ought to be taken is to be willing to sit down with the Cubans and discuss some of those issues.

One thing we have consistently learned over the years, that the Cubans, when they sit down to negotiate, when they talk, they talk seriously. We reached agreements with them in Angola. We reached agreements with them recently over migration. They are prepared to talk about issues and I think that we could both come out better.

The question, Senator, though, and I think this is the crucial question, is why has it been so difficult to encourage any change at all in U.S. policy towards Cuba over so many years? Why is it President after President retreats from any effort to build a foreign policy toward Cuba that makes more sense, that is more humanitarian, that is more likely to achieve U.S. goals?

Frankly, it is really one of the great disappointments that I have had in the Clinton administration is not that they have not changed policy but they have never had an internal debate over Cuba policy, that they refuse—it is taken off limits. People who have gone into the administration with the idea of wanting to at least begin a review simply say that nobody there wants to discuss it. It has been taken off limits.

That is why I think the only way that we are going to see change is if Congress begins to say, let us have a serious review. Until that happens, we are going to debate this, we are going to debate it in universities, we are going to debate it downtown in various think tanks and it is going to sound like a debate but there is no serious debate on Cuban policy.

Senator SIMON. I think you are correct in that.

Let me ask about your organization, forgive me for not knowing more about the Inter-American Dialogue, tell me about the organization.

Mr. HAKIM. It is a two-faceted organization. On one hand, it is an assembly of about 100 members, 50 from the United States, 50 from the rest of the hemisphere. Saul Lenowitz was one of the people that organized it. Recently, another cochair was Javier Perez de Cuellar. These are prominent people. We meet every couple of years. We issue reports on United States-Latin American relations. We set up task forces on certain particular issues, like Cuba, for one. We try to come out with reasonable approaches. We sometimes don't take a position but present a variety of positions.

Senator SIMON. I ask that because you mentioned our former ambassador in charge of negotiating the Panama Canal treaty, the former United Nations Secretary General. This is not some radical, wild group off there to the left. These are practical people who want practical solutions.

I regret my staff has just pointed out I am supposed to host a reception for the Rwandan president and I am going to have to go over to the Capitol.

I really appreciate your being here and testifying. I appreciate the testimony of all the witnesses. I do think there is a constitutional question on the whole question of travel that we ought to be looking at. I think there is also a policy question in terms of whether our present policy toward Cuba is in any way rational. I think it is an emotional response that no longer makes any sense.

I would like to include in the record a statement from Audrey R. Chapman, director of the Science and Human Rights Program of the American Association for the Advancement of Science.

[The prepared statement of Audrey R. Chapman follows:]

PREPARED STATEMENT OF AUDREY R. CHAPMAN

INTRODUCTION

The American Association for the Advancement of Science (AAAS) is the world's largest federation of scientific organizations, with 296 affiliated groups and over 140,000 individual members. Among the principal objectives of AAAS are to further the work of scientists, facilitate cooperation among them, improve the effectiveness of science in the promotion of human welfare, and to increase the public understanding and appreciation of the methods of science in human progress. Since 1976 the AAAS Committee on Scientific Freedom and Responsibility and the Science and Human Rights Program have been actively involved in supporting the human rights of members of the scientific community and promoting scientific freedom and responsibility. Attainment of these objectives involves both national and international activities.

AAAS and the scientific community in general are committed to the concept of the right to travel as an essential component of the collective dissemination of knowledge that is at the core of the scientific approach. For more than four decades AAAS has supported the right of scientists, researchers and academicians to be able to exchange and communicate ideas and to participate in scientific activities on a worldwide basis. Beginning in 1951 and continuing throughout the Cold War, AAAS actively opposed restrictions on travel and the free interchange of science that has no security implications between the United States and Soviet bloc nations. In 1980, AAAS was one of ten organizations which contributed to a brief submitted to the President's Select Commission on Immigration and Refugee Policy recommending that the President and Congress repeal the "ideological exclusion" section of the Immigration and Nationality Act mandating the exclusion of some foreigners from the United States on the basis of their political ideologies. AAAS has also been involved in issues relating to the freedom of emigration, particularly in relationship to scientists seeking the right to leave the former Soviet Union.

AAAS opposes the application of current restrictions on travel to and from Cuba by the Departments of State and the Treasury as inconsistent with internationally recognized rights, including rights to freedom of movement, freedom of opinion and expression, and freedom of assembly and association. The effects of such travel restrictions are not limited solely to infringements of the rights of individual scientists. The freedom of individual scientists to exchange ideas and data with others and to move from country to country is central to the fostering of international scientific cooperation in the search for truth and knowledge.

When members of several scientific organizations sought to attend professional meetings and international conferences held in Cuba, they were denied licenses by the Department of Treasury that would allow them to spend U.S. currency while in Cuba, making it effectively impossible for them to travel. As a result, the majority of these scientists were unable to participate in these events, and those that did

travel to Cuba did so at the personal risk of being fined individually by the Department of Treasury.

Licenses have been granted, however, on a very inconsistent basis. Existing standards of the travel policy have been interpreted and applied unevenly and arbitrarily. Treasury and State Department officials alone retain the discretion to decide which meetings and travel license requests they consider to be "legitimately" connected with academic and professional pursuits. The fact that a government agency is conducting pre-screening of the professional activities of reputable scientific groups and member scientists and is making judgements as to the legitimacy of their activities and the suitability of their travel causes concern as well. Those to whom licenses were granted received the Department's approval only after extreme difficulty and delay. In several cases, the intervention of AAAS and other scientific organizations was necessary.

The following scientific societies have appealed to AAAS for assistance when experiencing problems with travel to Cuba:

A. In 1987 the American Psychological Association was denied a group license for U.S. participants in the scientific program of the XXI Interamerican Congress of Psychology held in Havana, Cuba. Some U.S. scientists decided to attend regardless, and did so at the risk of being fined.

B. Members of the American Mathematical Society and the American Statistical Association who were planning to attend an internationally sanctioned and sponsored conference held by the International Mathematical Society scheduled from September 16 to October 1, 1993 in Havana were denied licenses by the Department of Treasury that would have allowed them to spend U.S. currency in Cuba. As a result, members did not attend the conference.

C. Weeks after the mathematicians were denied licenses, a group of engineers from the American Association of Engineering Societies applied for similar licenses in order to attend a meeting of the World Federation of Engineering Organizations in Havana beginning on October 17, 1993. Members were granted licenses, but not without long delays, and the necessity of submitting themselves to a detailed screening process by Treasury Department officials.

D. Trustees of the American Museum of Natural History, seeking to organize a trip to visit paleontology projects the Museum helped to develop in Cuba encountered difficulties in obtaining licenses.

E. A group of librarians attempting to take part in a conference in Cuba later this year have been experiencing problems in obtaining licenses.

It is important to note that the travel restriction policy also is adversely affecting the scientific community by restricting the inflow of scientists from Cuba to this country. The case of Dr. N. Capote Noy, a Cuban nuclear physicist working under a research contract with the International Atomic Energy Agency (IAEA) dealing with the measurement and evaluation of neutron induced helium production, was brought to the attention of AAAS by the American Physical Society. He and seven colleagues from other nations who were engaged in similar contract work for the IAEA were invited to participate in a meeting scheduled to take place in Oak Ridge, Tennessee in May, 1994, to review the results of their research activities. In December of 1993, State Department officials indicated that the U.S. would refuse to act as official host for the meeting unless Dr. Noy was dropped from the invitation list. They also suggested that even if the meeting proceeded without the U.S. serving as official host, Dr. Noy likely would be denied an entry visa, citing entry restrictions that have been imposed on Cubans visiting the U.S. for official purposes.

The IAEA was forced to find a new location for the meeting in another country because of this refusal. The meeting was subsequently held in Vienna, Austria. While this change resolved, or more accurately, avoided the problem presented by this particular case, our concern goes to the more general issue of whether the U.S. government should be denying scientists and scholars the right to travel and communicate, either here in the U.S. or in Cuba, especially in light of the newly adopted provisions of the Free Trade in Ideas Act of 1994. This action violated not only the human and professional rights of Dr. Noy, but our nation's obligations to an international agency whose assistance we seek in dealing with nuclear proliferation problems in North Korea and other nations.

Following the difficulties experienced by members of the American Association of Engineering Societies in acquiring the necessary travel licenses to attend a professional convention being held in Havana, staff of the AAAS Science and Human Rights Program and Dr. Frank von Hipple, Assistant Director for National Security Affairs at the Office of Science and Technology Policy, arranged a meeting between

members of a AAAS sponsored Right to Travel Working Group and representatives of government agencies dealing with restrictions on travel to Cuba in order to register the strong concerns of the scientific community regarding such restrictions. The meeting took place on 20 December 1993 and was chaired by Dr. von Hipple. In attendance were:

Representing the Scientific Community:

Alice Schafer, Chair, Committee on Human Rights, American Mathematical Society
Mary Gray, AAAS Committee on Scientific Freedom and Responsibility
Joseph Birman, Chair, Human Rights Committee, New York Academy of Sciences Paul Plotz, Co-Chair, Committee of Concerned Scientists
Joan Buchanan, American Psychological Association
Barrett Ripin, Committee on International Freedom of Scientists, American Physical Society
Howard Elman, Society for Industrial and Applied Mathematics
Brian Dougherty, American Association of Engineering Societies
Morton Sklar, AAAS Science and Human Rights Program

Representing the Government:

Dr. Frank von Hipple and Rahman Kahan, Office of Science and Technology Policy
Clara David and Charles Bishop, Office of Foreign Assets Control, U.S. Department of Treasury
Lisa Schreiber Hughes, Office of Cuban Affairs, U.S. Department of State
James Hamilton, Bureau of Economic and Business Affairs, U.S. Department of State

With respect to the question of how to better apply the existing restrictions, Ms. David indicated that the lack of a clear definition of the term "educational activities" in Congressional legislation resulted in Ms. Hughes and her being put in the position of having to make case by case judgments as to the "legitimacy" of each scheduled conference. A good deal of the inconsistency and arbitrariness of the application of existing restrictions may be due to having government officials who lack scientific expertise making judgments as to the legitimacy of specific scientific endeavors. It was, therefore, decided that the scientific community would seek to convince Congress to clarify the term. In addition, the government representatives agreed to consider placing greater reliance on the judgments of accredited scientific groups regarding the legitimacy of various scientific endeavors, rather than attempting to make such decisions themselves.

With respect to the broader issue of the propriety of imposing restrictions on scientific exchange under any circumstances, it was decided that the scientific community would provide the State/Treasury interagency review team currently reevaluating U.S./Cuba travel policies with greater input regarding their concerns. It was also proposed that when the report of the review team is complete, the team meet with members of the scientific community to explain its contents and receive feedback.

As a result of this meeting, AAAS contacted Representative Howard Berman and Senator John Kerry and urged them to introduce legislation which would serve to clarify the types of contacts and activities that should be included in the "educational activities" exemption to the travel ban. Representatives of the AAAS sponsored Right to Travel Working Group also met with Special Assistant to the President Morton Halperin on 6 April 1994 to register their concerns regarding the travel ban and to brief him about the conclusions reached at the 20 December meeting. Participants also urged him to support legislation aimed at clarifying the "educational activities" exemption.

Despite the apparent progress made during these meetings and the subsequent follow-up, AAAS learned from the ACLU Center for National Security Studies on 24 August 1994 that the Clinton administration is considering either banning all travel to Cuba, or further tightening current restrictions by banning all family travel and requiring specific license applications from journalists and professional researchers who are now permitted to travel to Cuba under a general license. The AAAS Committee on Scientific Freedom and Responsibility consequently wrote letters to both Secretary of State Warren Christopher and National Security Adviser Anthony Lake stating its opposition to any such restrictions and indicating their legal and ethical ramifications. Although the Committee received a letter from Mr. Lake on 19 September 1994 affirming the administration's commitment to the free exchange of ideas and information and indicating that "genuine" scientific endeavors

would still be permitted, no clarification regarding the process through which the legitimacy of such endeavors would be determined was included.

The AAAS and the Right to Travel Working Group, through much communication and correspondence, compiled a short list of recommendations that we believe would clarify and improve the current U.S. policy on travel to Cuba. These recommendations were initially presented and discussed at the Office of Science and Technology Policy Meeting on 20 December 1993 and the National Security Council Meeting on 6 April 1994. We still believe these recommendations to be the best solutions to the problems arising from the restrictions of travel. With the respect to the existing standards, we propose the following actions:

1. Evaluating travel requests on a group or meeting basis, rather than separately evaluating each individual applicant.
2. Giving greater weight to the recommendations of recognized national scientific organizations and educational groups authorizing or sponsoring meetings or projects when determining their legitimacy.
3. Placing greater reliance on the procedures of the International Council of Scientific Unions and its national affiliates in certifying appropriate international meetings and conferences.
4. Developing a standard checklist that can be distributed to travel applicants explaining the items of information needed to submit to establish the scientific or educational purpose of their trip to the satisfaction of government officials and indicating in greater detail the standards that will be applied in reviewing license applications.
5. More specifically clarifying the intended meaning of the term "educational activities,"in order to give the Department of Treasury additional guidance in applying this exemption.

It is important to note that there is already in existence a formal method for determining the scientific and educational legitimacy of proposed meetings and conferences: the review and certification procedure embodied in the guidelines and operating procedures of the International Council of Scientific Unions (ICSU). ICSU's guidelines specify that a meeting or conference is to be designated as a certified international scientific meeting if it is:

> * * * arranged or sponsored by ICSU itself or by Scientific Unions, Committees or Associates of the ICSU family. In all such cases, by definition, scientific meetings must be open to any member of the international scientific community without discrimination,

In our view following these standards set forth by the ICSU would provide the Departments of Treasury and State with a simple, well-documented method for dealing with travel requests from the scientific community, without having to review the request of each applicant traveler individually. Increasing communications between scientific organizations and the State and Treasury Department officials dealing with U.S./Cuba travel issues would be of major assistance for avoiding future mistakes involving travel license requests, and for dealing more effectively with concerns about undue governmental interference in scientific activities.

In conclusion, AAAS and the scientific community in general are committed to the right to travel as a fundamental human right and as an essential component of international scientific collaboration. The recent and current policies of the U.S. government that restrict educational and scientific exchange and relations with Cuba are inconsistent with the standards of international human rights law incorporating the concepts of freedom of expression and the right to travel. We urge your Committee and the Congress to take further actions to make clear that these types of restrictions are improper and unlawful.

Senator SIMON. Again, we appreciate your being here. Our hearing stands adjourned.

[Whereupon, at 4:06 p.m., the subcommittee was adjourned.]

# APPENDIX

## ADDITIONAL SUBMISSIONS FOR THE RECORD

### PREPARED STATEMENT OF MICHAEL L. SMITH,[1] CENTER FOR MARINE CONSERVATION

I am pleased to respond to the committee's request for testimony concerning the right to travel. My perspective is based on the needs for travel for the purpose of scientific research, particularly with regard to travel to Cuba where I have conducted field research for several years. My comments are organized around three issues:

(1) Why it is in the direct interest of the United States to conduct scientific research inside embargoed countries such as Cuba, especially in the fields of environmental monitoring and biodiversity,
(2) How scientific research and exchanges are contributing to democratization and the development of a civil society in Cuba, and
(3) How current restrictions on travel are interfering with scientific research and flow of information.

While the Florida Straits are usually regarded as a barrier that separates Cuba from the United States, they are viewed by marine scientists and conservationists as a unifying medium that irrevocably binds these two neighboring countries to certain common interests. The Center for Marine Conservation, which is the nation's leading private organization wholly devoted to protection of the marine environment, has been involved in research, environmental education, and marine management policy in the northern Carribean and southeastern U.S. waters for two decades.

#### U.S. SCIENTIFIC INTERESTS IN CUBA

The United States has jurisdiction over natural resources in several separate management units in the Wider Carribean Basin, including much of the Gulf of Mexico, the Strait of Florida, waters on the eastern coast of Florida that are under the influence of the Gulf Stream, and a large Exclusive Economic Zone that surrounds Puerto Rico and the U.S. Virgin Islands. The United States also claims Navassa Island and its surrounding marine zone between Cuba, Haiti, and Jamaica. Although people do not often think of the United States as a Caribbean country, these areas give the United States the broadest jurisdiction of any country in the Wider Carribean Basin and they constitute part of our *domestic* interest. A quick glance at a map of the Carribean will show that Cuba is located exactly in the middle of all these separate zones of U.S. interest. Because of its geographic location, Cuba is the linchpin in research on natural processes in the area. For the same reason, Cuba's environmental practices have an immediate effect in areas of direct interest to the United States. These facts provide the fundamental reason why U.S. scientists need to conduct monitoring and research activities that require travel to Cuba.

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The significance of research in Cuba can be established by considering the example of the U.S. Coral Reef Initiative, a major program recently developed by the U.S. government that is aimed at "the conservation and effective management of coral reefs." It is intended to reverse the declining health of coral reefs throughout the tropics, but with particular emphasis on reefs in U.S. waters. Preliminary research indicates that the health of coral reefs in Florida (the only complete reef systems in the continental United States) may depend significantly on the status of plant and animal populations in Cuban waters. Studies of currents based on drift bottles show that objects released in southern Cuba are carried to the east coast of Florida more than to any other place. These currents are thought to carry the drifting larvae of organisms that are likely to be important in the maintenance of animal populations in Florida's coral reef habitats. Consequently, the size of populations and number of species present in Florida's coastal waters may depend on the quality of Cuba's marine environment, so that it is very much in the interest of the United States to understand and monitor natural processes in that country. The same currents that carry drift bottles to Florida could also carry pollutants that damage coral reefs, a possibility that should cause the United States to include Cuba in research on marine pollution and drifting debris. Research in Cuba is also motivated by the richness of its biodiversity (that is, natural variety of species and other assemblages). Cuba has more species of plants and animals than any other Carribean island. It is the largest country in the Carribean, with about one-third of the land area. Consequently, it is the single most important country with respect to the conservation of West Indian biodiversity. Cuba is also significant in comparison to nearby continental areas. Relative to the United states and Canada, Cuba has 12 times as many mammal species per acre, 29 times as many amphibian species per acre, 39 times as many bird species per acre, and 27 times as many plant species per acre. In other words, an average acre in Cuba is many times more important to conservation than an average acre in the United States and Canada. Research on the amount and distribution of biodiversity in Cuba is therefore critical in the over-all effort to conserve living resources in the Carribean Basin.

Cuba also has extremely high rates of endemism (that is, local species that occur nowhere else). For example, more than 50 percent of Cuba's plants are endemic to the country. This is one of the highest levels of plant endemism in the world, surpassed only by the Cape of South Africa, Hawaii, and some parts of Australia. The high levels of endemism and large number of species in Cuba provide major motivations for research by U.S. scientists. The endemic species can be studied nowhere else in the world.

There has always been a trickle of scientific interchange between the United States and Cuba, but interest was greatly increased in the late 1980s. This is partly because U.S. research in the Wider Carribean had reached the stage where it became increasingly important to obtain detailed data from Cuba. It was also motivated in part by increasing recognition that biodiversity is a resource of global significance, but one that is being irreversibly lost on a world-wide basis due to extinction. In that context, the large endowment of biodiversity in Cuba could not continue to be neglected by U.S. researchers. In the late 1980s, several U.S. scientists independently developed research in Cuba that were conducted under the general license for professional research, which was available prior to the diplomatic crisis of August and early September of this year. Under the general license, several independent projects were developed involving studies of Cuba's marine and terrestrial environments and inventories of the country's biodiversity.

## SCIENCE AND CIVIL SOCIETY

In addition to providing information on Cuba's environment and natural systems, U.S. scientific activity in Cuba has had a significant effect in advancing democratic principles that are the basis of civil society. In February of this year, discussions were begun on the development of a U.S. Cuban exchange on environmental law. As in many centrally planned countries, Cuba has relatively little environmental regulation based on codified law. The development and effective enforcement of environmental law will be important in any scenario for Cuba's future. There will soon be a high rate of resource development in Cuba, whether the country makes a transition to a new form of government or whether it continues the current pattern of introducing economic policies that are radically new for Cuba. In the long-term interest of the country and its neighbors, it is important that such development occur with environmental concerns in mind. The establishment of environmental interests in a body of law is obviously an important democratic development.

It should be noted that U.S. scientists have been allowed by Cuban authorities to work freely with individual Cuban scientists and with both governmental and

non-governmental institutions. It is of particular significance that U.S. scientists have had unregulated contact with Cuba's scientific societies, because they are wholly democratic non-governmental organizations. As in the United States, each Cuban scientific society establishes its own by-laws, but generally the only criteria for membership are interest in the scientific goals of the society and payment of a membership fee. Since the societies receive no financial support or policy directions from the Cuban government, they are non-governmental organizations in the strictest sense.

It also appears that they are fully democratic organizations, at least with respect to their internal operations. Members meet in general assemblies in which officers are elected from among the members. The annual program of each society is also determined by democratic vote of the member at large. Cuban law would allow U.S. scientists to join such societies and even to vote in their democratic processes, but such activity would require a specific license under the regulations of the U.S. embargo. Given that several U.S. administrations have stated that the United States would respond to democratic developments in Cuba by progressively relaxing restrictions of the embargo, the current administration should encourage interaction with Cuba's democratic scientific societies. The possibility of supporting such organizations ought to be sufficient reason to facilitate rather than deter scientific travel to Cuba.

## EFFECTS OF TRAVEL RESTRICTIONS

Until recently, travel for research on Cuban biodiversity and natural habitats was allowed under a general license that permitted U.S. researchers to travel quite freely to and within Cuba. Under the regulations previously in place, programs developed that have involved scientists at 22 U.S. and Cuban institutions, resulting in hundreds of scientific visits and expeditions. These research projects probably constituted the most significant information-gathering activity by U.S. scientists in Cuba in the last thirty-five years.

As part of a general effort to tighten the embargo against Cuba, the general license for professional research was revoked on August 25, 1994. While general licenses still allow government officials and professional journalists to travel to Cuba, travel for scientific research has been reclassified in a category that require a specific license that will involve detailed applications and prior approval. Although it is unlikely that the new regulations were intended specifically to reduce scientific activity, the introduction of bureaucratic barriers to an activity always has the effect of discouraging it. It can be expected that the approval process will be lengthy because the number of activities requiring specific review by the Treasury Department has been greatly increased by the reclassification of travel categories. It should be made clear that the problem does not lie with the Treasury Department; it is the policy itself that is ill-conceived. Scientific research and its democratic effects are therefore likely to be among the casualties of the diplomatic events of the past months.

## CONCLUSIONS

It is in the direct interest of the United States to encourage research and environmental monitoring in Cuba and its territorial waters. For scientific and environmental reasons alone, the United States ought to establish a policy that would promote independent research programs carried out by diverse U.S. institutions. Such a policy must necessarily involve travel to Cuba that should be as free as possible from bureaucratic impediments or government controls. It should be in accord with the principles of academic freedom that have established the United States as the world leader in science. Beyond its scientific benefits a policy of open travel for research would have immediate impact in promoting the establishment of civil society.

Successive U.S. administrations from Ford to Clinton have stated the goal of promoting democracy in Cuba and other communist countries. Each administration has stressed the importance of communication and free flow of information in achieving that over-all goal. It should therefore be clear on the basis of principles stated by several administrations that restrictions on travel are adverse to our highest objective. In order to promote the transition of any country to a genuinely pluralist and civil society, it would be necessary to diversify and deregulate contacts, and to provide citizens in a country in transition with alternative social, economic and political values. Such values have never appeared in a vacuum.

PREPARED STATEMENT OF WAYNE S. SMITH

Currency controls imposed by the United States Government which have the effect of curtailing travel to Cuba contradict the most fundamental values on which our country was founded. They are almost certainly unconstitutional and also violate basic international conventions to which our government is a party. All such controls should be removed. The cold war is over. There can be no further justification for these violations of international standards, least of all by the U.S. government, which claims to respect the rights of its citizens and to believe in free movement of peoples and ideas across borders. More than that, it claims to believe in the rule of law, yet undercuts that claim by imposing travel controls that would no longer withstand the scrutiny of the courts. Perhaps recognizing its legal vulnerability, it has refrained from prosecuting recent travelers who have disregarded the controls. But the law itself needs to be removed from the statute books.

HISTORY OF U.S. TRAVEL RESTRICTIONS

Under the Helsinki agreements of 1975, the United States is committed to the free flow of people and ideas across national frontiers and in most cases it is a commitment our government respects. Indeed, it usually takes the position that the travel of our citizens to other countries and of theirs to ours is an important means of getting the message of American Democracy across. But in the case of Cuba it puts all that aside and opts instead for the kind of travel controls usually imposed by authoritarian governments. These controls ignore international standards of freedom of movement (exactly what we accuse the Cuban government of doing.) They are a direct violation of Article 12 of the United Nations' International Covenant on Civil and Political Rights, the most comprehensive body of laws governing human rights now in existence, and of Article 13 of the Universal Declaration on Human rights.

Travel controls are a relic of the cold war. Prior to World War II, the rights of American citizens to travel where they wished was not challenged by their government. During the cold war that followed, however, the State Department came up with a blacklist of countries—mostly communist states—to which American citizens could not use their passports to travel. This was, after a time, recognized as the infringement of constitutional rights that it was, the Supreme Court ruling in 1967 that the government could not prosecute American citizens for traveling to countries on the State Department's blacklist, which by then included Cuba.

In 1977, in order to comply fully with the Supreme Court's decision, the Carter administration lifted all controls on the expenditure of currency on travel to Cuba. If American citizens had a right to travel, it argued, then clearly they had a subsidiary right to spend money to do so.

But then enter the Reagan administration, which in 1982 reversed the decision and reimposed currency controls on grounds that Cuba was increasing its support for subversion in Central America and that it refused to negotiate foreign policy concerns with us. As I have pointed out in my book, The Closest of Enemies, this was simply not true. Quite the contrary, the Cubans had just suspended arms shipments to Central America and indicated to us their full disposition to discuss all outstanding problems. The Reagan administration ignored their overture, with the result that after a time the arms shipments began again. Meanwhile, the right of American citizens to travel had been curtailed on the basis of outright misrepresentations to the American people.

In imposing these measures, the Reagan administration claimed they were not travel controls per se; rather, they were currency controls. The result, however, was the same, for if citizens could not pay for their travel, they could not undertake it. Further, one provision of the act of 1917 specifies that it can be applied only in times of war or national emergency. Clearly, we were not at war. What was the national emergency? Again, the Reagan administration reached back into the past, citing, under a grandfather clause, the national emergency declared in response to the Korean war of 1950 as the legal underpinning for the currency-cum-travel controls imposed against Cuba in 1982!

Yet the Reagan administration did not invent the situation. Although the Korean War ended in 1953, no administration had declared the national emergency to be over. In several cases, it had even been argued that the cold war was an ongoing national emergency, of which the Korean War had been the opening chapter. When the Reagan administration's 1982 currency controls were taken to the Supreme Court in 1984, the majority of justices upheld their constitutionality, arguing that the grandfather clause had been correctly applied. Justices Blackmun, Brennan, Marshall and Powell argued strongly to the contrary, saying the currency controls represented an improper extension of presidential power. They, however, were in

the minority. Given the cold war and what were called new tensions with Cuba, the majority were prepared to give the Executive a wide latitude in the area of foreign policy and argued that the rights of citizens were overcome by the security needs of the nation.

Most students of law, reading the arguments ten years later, would probably side with Justice Blackmun and his colleagues who took the minority view. What is obvious, however, is that even if the majority was correct in 1984, all the grounds on which their decision was based have changed. The cold war is over. No argument could now be made that there is an ongoing emergency occasioned by our rivalry with the Soviet Union. The Soviet Union no longer exists. Gone too is the alliance that once existed between Moscow and Havana. And Cuba has long since ceased support for or involvement in revolutionary situations anywhere in the world. Yet, the rights of American citizens to travel continue to be curtailed.

Since 1982, only three categories of Americans have been allowed to travel to Cuba (and pay their bills) under a general license: academics doing research, journalists preparing a story, and relatives visiting families. In early 1994, there were reports that the Clinton administration would relax the controls by adding several other categories. These would have included those whose trips were related to cultural activities, human rights or religious affairs. In February, however, the State Department denied the reports, saying that Cuba would be excluded from any liberalization of controls.

The Clinton administration has suggested that the controls are a useful means of denying hard currency to the Cuban government and thus pressuring it to liberalize and show greater respect for human rights. The counter-argument is that allowing Americans to travel to Cuba would do more to encourage liberalization than tightening economic pressures, which have not worked in over thirty years and will not work now. Significantly also, all Cuban religious leaders and most human-rights activists urge us to lift travel controls. The Cuban Council of Catholic Bishops has urged the United States to do so. So has the Ecumenical Council. So have such human rights activists as Elizardo Sanchez, Francisco Chaviano, Lazaro Loreto, Yndamiro Restano, and Osyaldo Paya. As they put it, the more American citizens in the streets of Cuba's cities, the better for the cause of a more open society. The logic of their argument would appear to be unassailable.

When the very people our policy is supposedly designed to help tell us the policy is wrong and that it does more harm than good, surely our government should listen. The fact that it does not suggest that it has some other agenda and that encouragement of democracy and greater respect for human rights may not be the central motivation behind U.S. policy.

### CONTROLS IMPOSED BY THE U.S. GOVERNMENT ON THE TRAVEL OF CUBAN CITIZENS

The most objectionable impediments to the travel of Cuban citizens imposed by the U.S. government date back to a presidential proclamation in 1985. Handed down by President Reagan almost ten years ago, it barred the issuance of visas to Cuban officials, an action taken because the Cubans, in retaliation for the inauguration of Radio Marti, had suspended the U.S.-Cuban immigration agreement signed the year before. In 1987, the Cubans restored the agreement. The Reagan administration, however, never rescinded the proclamation. Subsequently, the cold war ended, the Soviet Union disintegrated and Presidents Reagan and Bush were replaced by Clinton. Even so, the Reagan proclamation of 1985 remains on the books. For years, it was interpreted so rigidly that not even Cuban academics or scientists were allowed to enter the United States, since they traveled on official passports. Under the Bush administration, that interpretation was eased. Academics, scientists, and low-ranking officials usually got visas. Shamefully, the Clinton administration recently has reversed that liberalization and begun to deny visas even to some of Cuba's most prominent academics and cultural figures, including several who have been in the United States many times and with respect to whom there cannot possibly be legitimate grounds for denial.

For example, in late October, 1993, the American Public Health Association held its annual conference in San Francisco. A few days later, on November 1 and 2, Johns Hopkins University held a conference in Washington on regional cooperation in public health. Vital issues were discussed among the Jamaican, Mexican, U.S. and Cuban participants: cooperation in the control and treatment of AIDS, of optic neuropathy, and a number of communicable diseases, and cooperation in research on these same illnesses. The Cuban minister of health, Dr. Julio Teja Perez, was invited. The State Department, however, indicated that the proclamation of 1985 remained fully valid and that while some exceptions could be made on a case-by-case basis, "current policy precludes such exceptions for senior officials."

Thus, the Cuban minister of health could not attend conferences to discuss regional efforts to control diseases that affect us all. We submit that any policy that has that effect is not only morally indefensible, but downright harmful to the interests of the American people.

All this is a direct contradiction of the Clinton Administration's expressed intention to expand communications, and especially cultural contacts. Rather than expanding contacts, it has restricted them.

NEW MEASURES

On August 20 of this year, the Clinton Administration went even further. Dropping any pretense of wishing to expand communications with the Cuban people, it rescinded the general license under which Cuban-Americans had been able to return to the island to visit their families and under which American scholars had been able to travel freely to conduct research and carry on scholarly exchanges. The first is simply inhumane, the second a blatant infringement of academic freedoms. In addition, charter flights were drastically reduced, making travel in general far more difficult.

Supposedly, these measures were taken to exert pressure on Castro to halt the flow of refugees and to enter into an agreement with the United States to resolve that problem. But on September 9, Castro did halt the flow and enter into such an agreement. The United States refused to lift the new restrictions on travel and to date has given no indication that it intends to do so. Unless and until it does, one can only say: "so much for the Clinton Administration1s interest in expanding contact between Cubans and Americans! So much for its devotion to the fundamental rights of American citizens!"

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
DIRECTORATE FOR SCIENCE AND POLICY PROGRAMS,
*Washington, DC, October 14, 1993.*

The Hon. CLAIBORNE PELL,
*Chair, Senate Foreign Relations Committee,*
*Washington, DC.*

DEAR SENATOR PELL: The American Association for the Advancement of Science (AAAS) is the nation's largest scientific organization, representing 138,000 individual members, and 296 affiliate societies. As a scientific group, AAAS strongly supports the principle of academic freedom, and the goal of facilitating the exchange of ideas and information. In connection with the State Department Authorization Bill that you presently have under consideration, we thought it important to bring to your attention problems our affiliate groups have been having with respect to travel restrictions imposed on individuals seeking to attend academic and professional meetings in Cuba.

Our groups are aware that Congress has attempted to prevent the Departments of State and Treasury from imposing restrictions on academic and professional meetings in Cuba, notably through amendments proposed in the last session of Congress by Rep. Howard Berman. Secretary of State Christopher convinced Congress to refrain from placing amendments to this effect in last year's appropriation's bill, with a promise that rules regarding this type of travel would be eased.

Administrative regulations along these lines were adopted this past June. But significant problems remain because Treasury Department Officials retain the discretion to decide which meetings and travel license requests they consider to be "legitimately" connected with academic and professional pursuits. The result of this discretion has been that members of the American Mathematical Society and the American Statistical Association were denied the right to participate in meetings of an international mathematics group in September. Members of other groups, most recently the American Association of Engineering Societies, have been granted travel licenses, but not without long delays, and the necessity of submitting themselves to a detailed screening process by Treasury Department officials.

As the attached letters from a number of our groups, including a recently published Letter to the Editor in the *Washington Post* make clear, we feel strongly that prior restraints and licensing requirements for travel and participation in academic and professional meetings is a clear violation of constitutional guarantees of free speech, travel and association. The AAAS Committee on Scientific Freedom and responsibility has as one of its primary goals the elimination of restraints on the ability of scientists to attend scientific meetings or carry out their professional and academic pursuits. Such restrictions also are inconsistent with international human rights standards on these subjects that the United States has agreed to observe

under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Helsinki Accords.

Since recent experience has indicated the insufficiency of the existing approach, we strongly urge you to include provisions in the current authorization bill prohibiting outright the imposition of restrictions or licensing requirements on travel connected with academic or scientific meetings and contacts. It is important that the principle of free association, travel and exchange that Congress and Secretary of State Christopher have committed themselves to observe be codified into law, rather than be left to discretionary application by Treasury Department officials. This can best be accomplished by including language to this effect in the group of *en bloc* amendments you will be attaching to the Bill before it goes to conference.

We appreciate your attention to this important issue, which has had particularly adverse effects on the scientific community. Thank you for your assistance.

Sincerely,

AUDREY R. CHAPMAN, PH.D.,
*Director, Science and*
*Human Rights Program.*

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
DIRECTORATE FOR SCIENCE AND POLICY PROGRAMS,
*Washington, DC, December 20, 1993.*

Dr. MARY GRAY,
*Department of Mathematics and Statistics,*
*American University,*
*Washington, DC.*

DEAR MARY: Over the past few months, the Science and Human Rights Program Office of the American Association for the Advancement of Science (AAAS) has distributed a number of case alerts involving the issue of academic freedom. Among the countries affected by these cases were:

- Ethiopia, where 42 professors, including the former dean of the Faculty of Technology and past president of the University of Addis Ababa, were arrested and dismissed from their teaching positions, with 18 student demonstrators also jailed;
- Cuba, where more than 20 professors and researchers were dismissed from their jobs for signing a "Declaration of University Professors" calling for increased academic freedom and observance of human rights standards;
- Mexico, where a number of scientists and environmentalists were dismissed from their research positions for investigating environmental hazards and publishing critical findings; and
- Uzbekistan, where a number of professors, including five scientists, were dismissed because of their peaceful support of political opposition groups.

In the course of collecting and distributing information on these cases we have become aware of the absence of an effective network and set of informational materials dealing with academic freedom concerns. To help remedy this deficiency, AAAS would like to explore the possibility of a joint initiative with the dual objectives of:

- Encouraging greater attention to academic freedom concerns on a more general basis; and
- Clarifying the standards and monitoring methods that can be used to identify and document potential violations.

To begin this process, we would like to invite you to join with us and a number of other AAAS affiliate groups here at the AAAS on Wednesday, January 19 at 2 p.m. The main purpose of the session is to form a committee to organize a consultation meeting on academic freedom needs and issues tentatively planned for April or May of 1994. Among the items to be covered by the consultation would be how to:

1. Facilitate and encourage increased exchange of information relating to academic freedom cases and concerns;
2. Assess the adequacy of existing standards and monitoring mechanisms for identifying and responding to violations;
3. Develop improved standards and monitoring approaches; and
4. Plan publication of a brochure explaining academic freedom requirements, reviewing current cases and needs, and providing suggestions on effective en-

forcement methods that can be used by local academic and human rights groups representing the interests of those directly affected by violations.

You may have additional ideas for items to include in the agendas for the January 19 planning session or the Spring consultation meeting.

Please R.S.V.P. to Morton Sklar, telephone: (202)326–6799, or fax (202)289–4950, by January 7, 1994. We hope that you or a member of your staff will be able to attend and help us begin this important new initiative.

Enclosed for your information are copies of the four most recent academic freedom case alerts distributed through the AAAS Human Rights Action Network on electronic mail. If you and other members of your staff and organization have not yet signed on as subscribers to the network, we encourage you to do so by sending the message:

SUBSCRIBE AAASHRAN FIRSTNAME LASTNAME

to the E-Mail address: "LISTSERV@GWUVM.GWU.EDU" on the Internet system.

It also would be helpful to our effort if you could circulate to each of the invited participants (see attached list) any materials your group has produced, or which has come to your attention from other sources, dealing with academic freedom. Brief listings and descriptions of longer reports or books will suffice. Reviewing these materials also may help us identify additional people or groups that should be taking part in this initiative. Your suggestions in this regard are very welcome. We look forward to seeing you on January 19.

Sincerely,

AUDREY R. CHAPMAN, PH.D.,
*Director, Science and Human Rights Program.*

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
DIRECTORATE FOR SCIENCE AND POLICY PROGRAMS,
*Washington, DC, April 5, 1994.*

The Hon. JOHN KERRY,
*U.S. Senate,*
*Russell Senate Office Building,*
*Washington, DC.*

DEAR SENATOR KERRY: I am writing on behalf of the American Association for the Advancement of Science (AAAS), the largest scientific organization in the United States, with 296 affiliated scientific groups and 140,000 individual members, to call your attention to the fact that the Departments of State and Treasury have been applying travel restriction policies in ways that unduly limit legitimate scientific and educational contacts and exchanges between the United States and Cuba.

This October, members of one of our affiliate groups, the American Mathematical Society, were unaccountably denied travel licenses to Cuba to attend an internationally recognized and sponsored meeting of mathematicians. Just a few weeks later, members of another of our affiliates, the American Association of Engineering Societies, were granted travel licenses to attend a professional meeting in Cuba, but not without considerable difficulty and urgent intervention on their behalf by AAAS. In November, the American Physical Society also brought to our attention the fact that a Cuban physicist, doing research work under contract with the International Atomic Energy Agency (IAEA) had been denied the right to attend an IAEA meeting scheduled to take place in the U.S., but subsequently moved to Vienna because of U.S. objections.

These examples are only the most recent of a long list that has resulted from the U.S. government's policy of applying travel restrictions to and from Cuba in a way that has limited academic and scientific exchange and the free flow of information and ideas. This has occurred despite the fact that Congress has tried to encourage the Executive Branch to exempt educational activities from restriction.

At a meeting at the White House Office of Science and Technology Policy that we helped to organize on December 20, 1993, representatives from a number of scientific organizations were informed by State Department officials that a major cause of the problem was that it was impossible for them to understand exactly what Congress had in mind when they exempted "educational activities" from the travel ban. They encouraged us to ask Congress for a more detailed definition of the type of contacts and activities that should be exempted. (See the attached letter of January 10, 1994 to Rep. Berman from AAAS.)

This background should explain why we believe it is urgent that Congress provide more specific guidance to the Executive Branch that would make clear that educational and scientific contacts and exchanges should not be subjected to governmental control or restriction under any circumstances. Without a clear and comprehensive Congressional mandate, recent history suggests that the State and Treasury Departments will continue to follow policies and practices that undercut our obligation. Under the U.S. Constitution and international human rights standards to assure freedom of expression and travel with respect to Cuba. We urge you to include proposed language to this effect as part of the State Department Authorization Bill now under consideration by a joint House and Senate conference committee, or, if not adopted in conference, as part of another piece of legislation.

Letters to the Editor that we published jointly with the American Mathematical Society and the New York Academy of Sciences in the *Washington Post* and the *New York Times* are enclosed for your information, along with a memorandum describing in detail our December meeting at the President's Office of Science and Technology Policy on Cuba travel policy issues.

Please feel free to call me at 202–326–6795 if I or my staff can be of any further assistance in securing passage of this important piece of legislation.

Sincerely,

AUDREY R. CHAPMAN, PH.D.,
*Director, Science and Human Rights Program.*

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
DIRECTORATE FOR SCIENCE AND POLICY PROGRAMS,
*Washington, DC, August 24, 1994.*

Hon. WARREN CHRISTOPHER,
*Secretary of State,*
*U.S. Department of State,*
*Washington, DC.*

DEAR SECRETARY CHRISTOPHER: As you know our past correspondence with your office and the several meetings we have helped to organize with White House and Executive Branch staff on the subject of Cuban travel, the Science and Human Rights Program of the American Association for the Advancement of Science (AAAS) has been very actively involved in efforts to remove travel restrictions involving Cuba. The recent experiences of a number of individual scientists and several of our scientific affiliate groups, including those representing psychologists, mathematicians, engineers and librarians, strongly suggest that existing government policies have produced unnecessary barriers to the free flow of ideas, and to the types of contacts and exchanges that are essential to the scientific and academic communities.

We had hoped that the review of travel policies that your Department has been in the process of organizing, together with the assurances you gave to the Congress expressing a strong commitment to a freer exchange of information, and the newly adopted provisions of the Free Trade in Ideas Act of 1994, would provide a firm basis for ending travel restrictions. However, we have just been informed by the American Civil Liberties Union that despite these reassurances the Clinton Administration may be considering not a relaxation of existing travel bans, but further restrictions that would eliminate the present exemptions that are permitted for travel to Cuba by family members, and researchers engaged in projects that require on-site work in that country.

It would be an unfortunate reversal of the progress that has been made in recent months by the Clinton Administration to return to a policy of applying travel restrictions as a means for exerting pressure on an unfriendly government. We understand the pressures the U.S. government is under to end repression in Cuba and to prevent the threat of massive emigration from that country being used for political purposes. At the same time, our government would be succumbing to repressive measures of its own if it continues to use restrictions on travel and the free flow of ideas as a method for penalizing the Castro regime. The principles of freedom to travel and to exchange information through direct contact and other means are too important to be jeopardized even for commendable objectives.

We hope you will continue to press for policies that support our commitment to free expression and exchange of ideas, and prevent the adoption of ill-advised attempts to use travel and exchange restrictions that are inconsistent with scientific and academic freedom and with basic democratic standards.

As you know, the freedom to travel issue has been a very critical one for the AAAS for a number of years. Since our AAAS Committee on Scientific Freedom and Responsibility Committee was formed in 1976, the freedoms to exchange information and ideas, and to maintain contacts with scientific colleagues around the world have been major focal points of our international human rights work. This is as true for restrictions that the U.S. government imposes on scientists and researchers seeking to meet and work in Cuba or other nations as it is for travel limitations imposed on scientists by the former Soviet Union (and unfortunately even today by the current government in Russia) because they are considered to be "holders of state secrets." It makes it much more difficult for us to criticize travel restrictions imposed by repressive governments when we apply similar limitations ourselves for what we claim to be more legitimate reasons. A far more rational approach is to refrain from using travel bans as a foreign policy instrument, and to maintain the right to travel in its proper place as a freedom established both under our own Constitution and international human rights law.

We also would like to take this opportunity to point out that similar passport restrictions that were imposed on travel by U.S. citizens to Lebanon may no longer be justified as a means to protect citizens from potential danger, and therefore would be in violation of the freedom to travel principle.

Copies of our prior letter to you on this subject, and of other documents we have helped to prepare relevant to this issue are enclosed. Please keep us advised on how this matter is handled, and on other developments that may take place regarding the freedom to travel issue.

Sincerely,

AUDREY R. CHAPMAN, PH.D.,
*Science and Human Rights*
*Program Director.*

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A26 SATURDAY, SEPTEMBER 4, 1993 THE WASH

The Washington Post

AN INDEPENDENT NEWSPAPER

# *Travel to Cuba*

THIS WEEK, Daniel Walsh, an Alexandria graphics dealer who has been trying to get government permission to travel to Cuba, received word that he will be allowed to go. He wants only to spend a week or two on the island to meet with artists and dealers and make arrangements to import some of the political posters he says are among the finest produced in the Western Hemisphere. The U.S. trade embargo on Cuba allows transactions involving this kind of material, but neither the Treasury, which enforces the embargo, nor the U.S. courts had accepted Mr. Walsh's view that travel incident to this kind of trade is allowed. In June, however, the Treasury amended its regulations to grant such an exemption, and Mr. Walsh will be the beneficiary.

What about other Americans who want to travel to Cuba? Technically, travel to that country is not banned, as it now is to Iraq, Libya and Lebanon. But the embargo prohibits the expenditure of U.S. dollars for that purpose. There are a few exceptions for researchers, journalists and those having close relatives in Cuba. But the average American cannot go unless someone in Cuba is willing to pick up the tab for all his expenses. As relations with Cuba ease, there may be more relaxation of the embargo. But a broader approach to the travel question should be considered.

Rep. Howard Berman (D-Calif.) has introduced legislation that would exclude travel-related expenditures from trade embargoes and specifically protect cultural, scientific and educational exchanges, reciprocal news bureaus and payments made for artistic or literary ventures during times when other kinds of commerce are prohibited. The bill has been put on hold pending an interagency study led by the State Department, but it is a good idea.

It is occasionally necessary to impose an embargo in order to bring pressure on another country. The citizens of that country feel the restriction, and commercial interests in the United States bear the burden of this government's decision. But why should funds that allow for travel and promote the exchange of ideas and information also be restricted? Surely the money spent on hotel rooms or guidebooks, or the amount needed to bring a ballerina or a student here, has little impact on the economy of the targeted country. Allowing such expenditures would not cause a significant breach in an embargo, but it would send a signal that Americans value their right to travel and receive information, and that this government is unafraid of that kind of commerce with an adversary.

# *End the Ban on Travel to Cuba*

"Travel to Cuba" [editorial, Sept. 4] encourages a rethinking of the U.S. government's trade embargo with Cuba, praising the Treasury Department's recent grant of a license to import Cuban poster art after rejecting the request for several years.

As if to demonstrate the irrationality and arbitrary nature of the travel and trade ban, Treasury soon after denied a group of American mathematicians a permit to participate in an internationally sponsored scientific conference scheduled to take place in Havana at the end of this month. While nominally free to attend, without the permit scientists are prohibited from spending U.S. currency while in Cuba, resulting in what amounts to a travel ban as a practical matter.

The legality of an embargo that precludes citizens from travel, contacts and the free exchange of ideas in foreign countries is questionable under any circumstances. Throughout the Cold War, the U.S. government did not restrict the travel and communication of scientists to the Soviet Union and Eastern Europe, except for those engaged in classified research. Why should travel and scientific communication involving Cuba be treated any differently?

It is one thing to ban trade with Cuba to prevent this country's economic resources from being used to support a repressive regime. It is quite another to cut off travel, contacts and exchange of ideas. We are committed to the notion that free expression and association are fundamental to the American democratic system. What is the rationale for applying a different, nondemocratic standard when Americans seek to communicate or visit abroad, especially when such a ban violates our international treaty commitments under the Covenant on Civil and Political Rights (which the United States recently ratified) and the Helsinki Human Rights Accords?

As a matter of principle, many individuals may choose not to be part of contacts and scientific exchanges with countries engaging in apartheid, terrorism or other gross violations of human rights. Taking that position is their prerogative and, many would suggest, a personal obligation. That is quite different from our government's enforcing a policy that makes travel and contact subject to the capricious whim of Treasury Department officials. The Cuban trade embargo needs rethinking, especially as it applies to personal travel and academic freedom.

MARY GRAY
ALICE SCHAFER
Washington

*The writers are, respectively, on the Committee on Scientific Freedom and Responsibility, American Association for the Advancement of Science, and chair of the Human Rights Committee, American Mathematical Society.*

*Letters should be signed and must include the writer's home address and home and business telephone numbers. Because of space limitations, those published are subject to abridgment. Although we are unable to acknowledge those letters we cannot publish, we appreciate the interest and value the views of those who take the time to send us their comments. Letters intended for publication should be addressed to Letters to the Editor.*

The Washington Post

EUGENE MEYER, 1978–1959
PHILIP L. GRAHAM, 1924–1963

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Washington Post
9/23/93

*November 8, 1993.*

Dr. FRANK VON HIPPEL,
*Assistant Director for National Security Affairs,*
*Office of Science and Technology Policy,*
*Executive Office of the President,*
*Washington, DC.*

DEAR DR. VON HIPPEL: Thank you for the letter you faxed to us on Friday regarding the U.S. policy on travel to Cuba as it affects scientists and scientific groups seeking to attend professional and academic conferences in that nation. We very much appreciate your efforts on behalf of these groups with the Office of Foreign Assets Control at the Department of the Treasury. No doubt, your inquiry and intervention regarding the application of the American Association of Engineering Societies to attend the conference of the World Federation of Engineering Organizations held in Havana in mid-October played a major role in their being granted a travel license.

What strongly concerns our groups, as the number of letters on this issue that you have received attests, is that the travel license policy tends to be unevenly and arbitrarily applied. Only three weeks before the engineers received their licenses, members of the American Mathematical Society had their applications to attend an equally legitimate professional conference in Havana denied. In addition, there is substantial concern about a government agency conducting pre-screenings of the professional activities of reputable scientific groups and member scientists, making judgments as to the legitimacy of their activities and the suitability of their travel.

For these reasons, we are pleased to accept your kind offer to host a meeting between representatives of concerned scientific organizations and Treasury Department officials. Attached is a listing of the names of contact persons from AAAS affiliate organizations that have expressed particular concerns about the Cuba travel restrictions. These individuals should be invited to attend, along with representatives of the AAAS Science and Human Rights Program office. May we also suggest that this meeting should include the officials from the Department of State and the President's National Security Advisor's Office who have been preparing a report and recommendations on the Cuba travel policy pursuant to a request from Secretary of State Christopher. As your letter notes, we need to treat this matter "as a generic issue" so that we are not faced with similar problems in the future when other scientific groups find themselves facing travel licensing restrictions. This can not be done without the involvement of all of the key officials outside of the Treasury Department who are in the process of examining and reformulating the policy in question on a more general basis. The two State Department and National Security Adviser staffers we have been working with on this matter are David Bernstein of the Office of the Assistant Secretary for Human Rights and Alan Kreshko with the National Security Adviser's Office.

We look forward to your meeting, and appreciate your responsive efforts to deal with the concerns of our affiliate groups.

Sincerely,

MORTON H. SKLAR,
*Senior Program Associate,*
*Science and Human Rights Program.*

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*December 16, 1993.*

TO: Selected AAAS Affiliate Groups

FROM: Morton Sklar, Science and Human Rights Program

SUBJECT: *U.S./Cuba Cases on Freedom to Travel and the Right to Conduct Scientific Pursuits Without Government Interference*

Enclosed for your information, is a copy of a letter of appeal that has just gone out from our office and the AAAS Committee on Scientific Freedom and Responsibility dealing with the policy of the United States government to restrict entry of Cuban scientists into this country. In this specific case, a Cuban nuclear physicist working under a research contract with the International Atomic Energy Agency is being denied the right to attend an IAEA meeting in Oak Ridge to review the subject of the research. You may wish to join with us in filing letters of inquiry and appeal on this matter.

Also enclosed for your information, in the event you have not already received it, is a copy of a previous case alert we filed concerning the policy of the U.S. government to restrict work related travel of American scientists to Cuba to attend scientific meetings. A number of our affiliate groups have been directly affected by this

policy. Representatives from several of these AAAS affiliates will be meeting with State and Treasury Department officials on Monday, December 20, to discuss this issue. We plan to raise the new IAEA Cuban case at that meeting. We will keep you posted on the results.

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
*Washington, DC, September 15, 1993.*

Mr. JOHN SHATTUCK,
*Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs,*
*U.S. Department of State,*
*Washington, DC.*

DEAR ASSISTANT SECRETARY SHATTUCK: The Science Human Rights Program office of the American Association for the Advancement of Science (AAAS) has received information, subsequently confirmed by contact with the U.S. Department of State, that a scientist invited to participate in an upcoming International Atomic Energy Agency conference to be held in the U.S. is being denied the opportunity to attend because he is a Cuban national. Ms. Tracy Brown, a State Department official in your International Organizations (Scientific Programs) Office, as well as Robert Dannucci, a representative of Argonne National Labs, the government contractor handling IAEA liaison work, have confirmed that for the U.S. to agree to become official host of the conference, the name of the Cuban invite would have to be dropped from the official "List of Member States Invited to Participate," because our country does not have diplomatic relations with Cuba. They also indicated that the invited Cuban would likely be denied a visa to attend the conference, even if the U.S. were not designated as official host.

The conference, on coordination of nuclear research relating to "Measurements, Theoretical Computation and Evaluation of Neutron Induced Helium Production Cross Sections," is scheduled to take place in Oak Ridge, Tennessee from May 3 through 6, 1994. The name of the Cuban invite is Dr. N. Capote Noy. Dr. Noy is one of eight scientists conducting research on the subject matter of the conference for the IAEA. His IAEA Contract Number is 7049/RB.

Because of your past work on civil liberties issues, we know you are familiar with our nation's entry restrictions on nationals of Cuba and other countries with Communist governments, and the effort to remove these restrictions. This case involves two additional elements beyond the typical freedom to travel case that deserve special consideration. First is the ability of an international agency to conduct its work without restriction, in this case convening a meeting of those doing research under contract to the agency. Second is the principle of the freedom of scientific contact and exchange—a principle closely linked with international human rights obligations under the Helsinki Accords and a number of other human rights instruments recognizing the right to travel and the freedoms of expression and association. To deny an internationally recognized scientist the ability to attend a research and evaluation meeting sponsored by the international agency that has contracted for his services would constitute a serious violation of these principles, and constitute a significant intrusion by our government into the area of scientific freedom. It also would undermine efforts by the United States to encourage more open exchange and travel policies by other countries.

We hope you will be able to bring these concerns to the attention of the officials unwilling to approve Dr. Noy's attendance at the Oak Ridge meeting, and that you can encourage them to adopt a policy regarding Dr. Noy and other future cases that is more consistent with our international human rights obligations and objectives.

As you know, AAAS and a number of our affiliate scientific organizations, including the American Physical Society and the American Association of University Professors, have taken an active roll in seeking elimination of travel and visa restrictions that impede the free flow and exchange of scientific and other informational contacts. In 1951, 1955 and 1956, the Council of the AAAS adopted formal resolutions endorsing efforts "to remove McCarran-Walter Act provisions that limit the travel of recognized foreign scholars and scientists to this country." In 1979, Professor John Edsall, former Chair of the AAAS Committee on Scientific Freedom and Responsibility, testified before a Congressional committee studying U.S. compliance with the Helsinki Accords. He cited the importance of removing travel restrictions as part of our commitment to free speech and open scientific exchange. Over the years AAAS has voiced its support for a number of scientists barred from entering the U.S. to participate in scientific meetings and discussions, including another

Cuban, Dr. Manuel Limonta, who was refused a visa to attend a conference on biomedical science hosted by the New York Academy of Sciences in 1988.

As the nation's largest scientific organizations with 138,000 individual members and 296 affiliated groups, the AAAS has a special concern about the treatment of scientists, engineers and health care workers throughout the world, as well as teachers and students in the fields. Our Committee on Scientific Freedom and Responsibility, formed in 1976, addresses these issues, and has given particular attention to cases involving persecution of scientists, and denial of their rights to travel and to conduct their professional work without governmental interference.

We look forward to hearing from you regarding the case of Dr. Noy, and hope that you can report more general progress in adoption of State Department policies eliminating travel restrictions affecting scientists and other scholars and researchers seeking to engage in legitimate professional contacts and information exchanges.

Sincerely,

C.K. GUNSALUS,
*Chair, AAAS Committee on Scientific Freedom and Responsibility.*

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
DIRECTORATE FOR SCIENCE AND POLICY PROGRAMS,
*Washington, DC, January 10, 1994.*

The Hon. HOWARD L. BERMAN,
*Member of Congress,*
*Rayburn House Office Building,*
*Washington, DC.*

DEAR REPRESENTATIVE BERMAN: Because of your substantial interest in the issue of restrictions imposed by the United States government on travel to Cuba for educational purposes, we would like to keep you informed of recent developments in a number of cases on this matter that our office is handling. On December 10,. 1993, the White House Office of Science and Technology Policy, at our request, convened a meeting of nine scientific organizations and representatives of the Departments of State and Treasury to discuss recent cases, and the interagency effort that is now taking place to review current U.S./Cuba travel policies. A copy of a summary of that meeting is enclosed.

One of the specific suggestions made by State and Treasury Department officials to us at that meeting was the need to obtain from you more detailed guidelines on the meaning of the term "educational activities" that are exempted from travel restrictions under provisions you were able to add to the embargo legislation. Treasury Department officials, in particular, indicated that the absence of clearer guidance on the meaning of this term may well have contributed to the denial of travel licenses for legitimate academic and scientific activities, including the recent rejection of a request from the American Mathematical Society and several of its members to attend an internationally recognized conference of mathematicians held in October of last year. They invited us to request from you a more detailed explanation of the types of activities that Congress had in mind when it adopted this exemption.

The position we took at the meeting, and which we hope you will be able to support in any additional guidelines you are able to provide to the Treasury and State Department officials handling these matters, is that requests from legitimate scientific and academic organizations and meetings certified by accredited bodies such as the International Council of Scientific Unions and its national affiliates, should be approved automatically, without government officials making separate (and largely uninformed) judgments on the legitimacy of proposed scientific and educational activities. We also suggested that licensed requests supported by a recognized scientific or academic organization should be handled on a group basis, rather than requiring each individual applicant to demonstrate an approved purpose for the proposed travel.

We would be pleased to work with you and your staff in drafting the additional guidelines that State and Treasury officials have requested.

We also wanted to officially bring to your attention the new case that has come to our attention regarding Dr. R. Capote Noy, a Cuban nuclear physicist working on a research contract for the International Atomic Energy Agency. Dr. Noy has been denied permission to enter the U.S. to attend an IAEA meeting scheduled for May, 1994 in Oak Ridge, Tennessee, whose purpose is to review the work and findings of Dr. Noy and eight other IAEA contractors doing research on related subjects. Because of this refusal, the IAEA was forced to find a new location for the meeting

in another country. While this resolves, or more accurately, avoids the problem presented by this particular case, our concern goes to the more general issue of whether the U.S. government should be denying scientists and scholars the right to travel and communicate either here in the U.S. or in Cuba, especially in light of the amendments on this topic that you have been able to make part of U.S. law.

We would appreciate your assistance in our efforts to revise existing policies to bring them into conformity with internationally recognized human rights standards, and with the principle of scientific and academic freedom. As our review of the December 10 meeting indicates, we have requested the opportunity for representatives of the scientific community to meet with members of the Treasury and State Department inter-agency review team currently considering revisions in U.S./Cuba travel policies. Perhaps you could indicate support for this request, and for maintaining better communication with scientific and academic organizations more generally, as part of the explanation of the educational activities exemption that you will be providing.

Please keep us informed of further developments that come to your attention on this issue. We will do the same. Your long-standing efforts in support of broader recognition of the importance of academic contacts and exchanges between the U.S., Cuba and other nations experiencing strained official relations with the U.S. are very much appreciated and supported.

Sincerely,

MORTON SKLAR,
*Senior Program Associate,*
*Science and Human Rights Program.*

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
DIRECTORATE FOR SCIENCE AND POLICY PROGRAMS,
*Washington, DC, April 7, 1994.*

Mr. MORTON HALPERIN,
*Special Assistant to the President,*
*Executive Office of the President,*
*Washington, DC.*

DEAR MORTON: On behalf of the representatives of the scientific community who attended your meeting on Cuba travel policies yesterday, including Mary Gray of the American Mathematical Society, Barrett Ripin of the American Physical Society, Harry Tollerton of the American Association of Engineering Societies, Diane Kuntz of the American Public Health Association and myself, we would like to thank you for your interest in this issue, and provide you with the material you requested during the discussions.

First, you requested more detailed documentation on specific cases where the Departments of Treasury and State had violated the existing policy of denying travel licenses to scientists and scientific groups seeking to attend legitimate scientific or educational activities. This past October, a group of mathematicians from the American Mathematical Society seeking to attend an internationally sanctioned and sponsored conference in Havana were denied licenses. A group of engineers from the American Association of Engineering Societies were granted licenses a few weeks later for a similar meeting in Cuba, but not without extraordinary difficulty and delay, and the necessity of intervention by the AAAS. We have just been informed that the Trustees of the American Museum of Natural History, seeking to organize a trip to visit paleontology projects the Museum has helped to develop in Cuba, are encountering similar difficulties, as are a group of librarians attempting to take part in a conference in Cuba later this year.

It is important to note that the travel restriction policy also is adversely affecting scientists from Cuba seeking to carry out their professional work here in the U.S. For example, in December, 1993, Dr. Capote Noy, a physicist under contract to do research for the International Atomic Energy Agency (IAEA), was denied permission to attend a conference scheduled by the IAEA in Oak Ridge to review the results of his work. This action violated not only the human and professional rights of Dr. Noy, but our nation's obligation to an international agency whose assistance we seek in dealing with nuclear proliferation problems in North Korea and other nations.

Materials on these cases are attached for your information.

We believe your office can contribute in two very important ways to eliminate the difficulties caused by the Cuba travel policy. First, is to support the initiative now taking place in Congress in the context of the State Department Appropriations Bill to include provisions that would make even clearer the government's policy that travel to and from Cuba for educational, scientific and professional purposes must

not be restricted. Although State and Treasury departments have assured us that travel for these purposes is not intended to be affected, their actions have made clear that this policy must be made binding through statute if it is to be properly observed.

Second, even if the new legislative amendment does not pass, we hope that you can convince the Treasury and State Departments to adopt more rational and consistent standards in applying travel policies. At a meeting on December 20 at the Office of the President's Science Advisor, for example, our groups proposed a series of steps that could be taken that would greatly improve matters. These included:

1. Evaluating requests on a group or meeting basis, rather than for each individual applicant.
2. Giving greater weight to the recommendations and requests of recognized scientific and educational groups authorizing or sponsoring meetings or projects.
3. Placing greater reliance on the procedure used by the International Council of Scientific Unions in certifying appropriate international meetings and conferences.
4. Developing a standard checklist that can be distributed to travel applicants explaining the items of information they need to submit to establish the scientific or educational purpose of their trip to the satisfaction of government officials.

May we suggest that the pending cases involving the travel requests from the trustees of the American Museum of Natural History and the librarians would be highly appropriate places where these clearer and more logical review policies could be applied.

Thank you for your interest and attention to this matter, which is of considerable importance to a large segment of the scientific and academic communities.

Sincerely,

MORTON SKLAR,
*Science and Human Rights Program.*

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AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE,
DIRECTORATE FOR SCIENCE AND POLICY PROGRAMS,
*Washington, DC, April 11, 1994.*

Mr. MORTON HALPERIN,
*Special Assistant to the President,*
*National Security Council,*
*Washington, DC.*

DEAR MORTON: As a further follow up to our meeting of April 7 on Cuba travel policies. I wanted to forward to you the attached material provided by Joseph Birman of the New York Academy of Sciences and the Committee on International Freedom of Scientists of the American Physical Society (APS). Dr. Birman unfortunately did not have sufficient notice of the meeting to be able to attend from New York, but he, and Dr. Barrett Ripin (also of APS) who did attend the meeting, wanted to stress that there already is in existence a formal method for determining the scientific and educational legitimacy of proposed meetings and conferences. That is the review and certification procedure embodied in the guidelines and operating procedures of the International Council of Scientific Unions (ICSU). ICSU's guidelines specify that a meeting or conference is to be designated as a certified international scientific meeting if it is:

> * * * arranged or sponsored by ICSU itself or by Scientific Unions, Committees or Associates of the ICSU family. In all such cases, by definition, scientific meetings must be open to any member of the international scientific community without discrimination, in accordance with ICSU Statute 5."

In Dr. Birman's view, once ICSU requirements have been met, the U.S. government is duty bound to accept travel requests to a certified conference as satisfying valid scientific and educational purposes. He points out that following these standards would provide the Department of Treasury and State with a simple, well-documented method for dealing with travel requests from the scientific community, without having to review the request of each applicant traveler individually. He also notes that the meeting of mathematicians held in Cuba this past October was cer-

tified by ICSU, although travel requests by American mathematicians to attend the conference were improperly denied by the U.S. government.

Sincerely,

MORTON SKLAR,
*Science and Human Rights Program.*

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American Association for the Advancement of Science

Directorate for Science and Policy Programs
1333 H Street, NW, Washington, DC 20005
(202) 326-6600 FAX (202) 289-4950

**TELEFAX MEMORANDUM:** (Page one of one)

**To:** Dr. John H. Gibbons
Assistant to the President for Science and Technology

**From:** Morton H. Sklar, Senior Progrm Associate
Science and Human Rights Office, AAAS

**Subject:** Denial by the Treasury Department of License Requests of Mathematicians to Attend International Professional Conference in Cuba, Sept. 26-Oct. 1

Three prominent scientific organizations, AAAS, the National Academy of Sciences and the American Mathematical Society, have just received formal notification that the U.S. Department of Treasury has denied requests of American mathematicians to attend a non-political professional meeting sponsored by the Swiss-based International Mathematical Union to be held September 26 through October 1, 1993, in Havana, Cuba.

Our three organizations believe this action is in violation of basic principles of academic freedom, as well as being inconsistent with obligations the United States government has assumed under the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and other international human rights legal standards. These instruments guarantee freedom of travel, thought, expression and association. The denial of access to the meeting also is inconsistent with standards relating to the free exchange of ideas and freedom of travel spelled out in Agreements of the Conference on Security and Cooperation in Europe (the Helsinki Accords), to which the United States is a signatory.

We would like to enlist your help in overturning, as quickly as possible, the Treasury Department decision, so that American mathematicians can be represented at the conference, and so that the United States does not provide so blatant an example of repressive human rights policy to emerging democracies. To help accomplish this, and to help us understand the basis for the action that has been taken, we would urgently request a meeting with you during the week of September 6 through 10. Because of the teaching responsibilities of the representative of the American Mathematical Society, a morning meeting is preferred.

You can reach me during the week-end at my home (301/946-4649, or at the office the first of next week. We would very much appreciate your support and participation in this matter.

NATIONAL ACADEMY OF SCIENCES

[illegible]
[illegible]
[illegible]

April 27, 1993

Mr. Steve Pinter
Chief of Licensing
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Second Floor Annex
Washington, DC 20220

Dear Mr. Pinter:

I call to your attention the announcement of the 2nd International Conference on Approximation and Optimization in the Caribbean, to be held in Havana, Cuba, 26 September through 1 October 1993. The meeting is being held under the partial sponsorship of the International Mathematical Union (IMU), an international, non-governmental organization in which the National Academy of Sciences holds membership on behalf of the U.S. mathematicians. It is a multilateral activity and should not be viewed in the context of bilateral U.S.-Cuba relations. Consequently, I call upon the U.S. Administration to permit U.S. mathematicians to participate in the conference.

Meetings convened under the sponsorship of international unions, such as the IMU, are considered open to all *bona fide* scientists without restrictions related to race, religion, political philosophy, ethnic origin, citizenship, language, or sex. This strong policy of non-discrimination, or "free circulation of scientists", is an integral feature of the meetings and relates either to a scientist's ability to get permission, if necessary, to leave his or her country, or to gain entry into the country hosting the meeting. The IMU is one of 20 constituent unions federated in the International Council of Scientific Unions (ICSU) which is the body responsible for the articulation of this policy. Since the National Academy of Sciences is the adhering body to ICSU, it would be a serious political embarrassment to have the United States in violation of the policy by having it on record that a *bona fide* U.S. scientist was denied permission to travel to Cuba for an open scientific meeting.

THE NEW YORK ACADEMY OF SCIENCES,
HUMAN RIGHTS OF SCIENTISTS COMMITTEE,
*October 5, 1993.*

The Hon. WARREN CHRISTOPHER,
*Secretary of State,*
*U.S. Department of State,*
*Washington, DC.*

DEAR MR. SECRETARY: We write on behalf of the New York Academy of Sciences, representing over 38,000 scientists, and its Human Rights of Scientist Committee, to protest a recent action by the Department of Treasury which denied a group of mathematicians the licenses the government requires for them to attend a conference of the International Mathematical Union which was held in Havana, Cuba September 16–October 1, 1993. Another group, made up of engineers, is still awaiting to attend a meeting in Havana of the World Federation of Engineering organizations to begin on October 17, 1993.

These two cases are only the most recent examples of a broader, ongoing policy problem that American scientists and academics have been experiencing regarding the imposition of restrictions on travel and academic exchange with Cuba.

We have a long history of intervening in cases in the former Soviet Union, in Eastern Europe, in China, in South and Central America where scientists were denied permission to travel by their own, usually totalitarian, governments.

It is a shock to us that the United States has effectively placed itself in the ranks of these regimes which repress the free circulation of scientists. Our Academy strongly supports the view that freedom of travel and academic exchange is an essential part of our democratic system, firmly linked to constitutional guarantees of free speech and association.

We protest in the strongest possible way and we join the National Academy of Sciences, the American Mathematical Society, the AAAS, the American Physical Society and other learned professional societies, in asking for assurances that this policy will be reversed. What our group would like to see is a policy that stands behind the idea of unrestricted travel and academic exchange, without prior filtration through foreign policy or national security concerns.

We believe these actions are inconsistent with obligations the U.S. government has assured under the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and in Agreements of the Conference on Security and Cooperation in Europe (the Helsinki Accords) to which the United States is a signatory.

We look forward to hearing from you.

Sincerely,

JOSEPH L. BIRMAN,
*Chairman, Human Rights Committee.*

CYRIL M. HARRIS,
*Chairman, Board of Governors.*

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SOCIETY FOR INDUSTRIAL AND APPLIED MATHEMATICS,
*Philadelphia, PA, October 13, 1993.*

The Hon. WARREN CHRISTOPHER,
*Secretary of State,*
*U.S. Department of State,*
*Washington, DC.*

DEAR SECRETARY CHRISTOPHER: I am writing to support the letter of 23 September 1993 addressed to you by Audrey Chapman, Director of the Science and Human Rights Program of the American Association for the Advancement of Science (AAAS), concerning the U.S. ban on travel to Cuba.

The Society for Industrial and Applied Mathematics, SIAM, is an international association of professional mathematical scientists with headquarters in Philadelphia. The society publishes eleven professional journals and numerous monographs in various areas of applied mathematics and has about 9,000 members world-wide including many of the world's leading applied mathematicians.

We strongly support your statement to the House Committee on Foreign Affairs of 7 June 1993 that the U.S. should pursue a foreign travel policy that will assure free "dissemination of information and ideas as a significant element in the promotion of democracy." We also agree completely with the AAAS position expressed in Ms. Chapman's letter that "freedom of travel and academic exchange is an essen-

tial part of our democratic system firmly linked to the constitutional guarantees of free speech and association. The types of broad national security and foreign policy based exemptions you [i.e., the State Department] have proposed, and that the Treasury Department has been applying in a very arbitrary fashion through its licensing authority, are totally inconsistent with these basic principles".

Therefore, we share the hope of the AAAS that the inter-agency review team under your direction that is currently re-evaluating U.S. travel policy will recommend the elimination of restrictions on travel and communication relating to academic and intellectual pursuits. We also strongly agree with Ms. Chapman that to be meaningful this policy must eliminate the need to obtain "licenses" before these exchanges take place, since this "licensing" procedure discourages the exercise of these protected rights and is subject to arbitrary and inconsistent decisions, as we have recently witnessed.

Please keep us advised on the progress of your inter-agency review. We would greatly appreciate receiving a copy of your report and policy recommendations when it is completed.

Sincerely,

PROF. AVNER FRIEDMAN,
*SIAM President.*

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AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
*Washington, DC, September 27, 1993.*

The Hon. WARREN CHRISTOPHER,
*Secretary of State,*
*Department of State,*
*Washington, DC.*

DEAR SECRETARY CHRISTOPHER: The American Association of University Professors, founded in 1915, is this nation's foremost organization dedicated to defending principles of academic freedom. We understand that mathematicians in this country who had planned to participate in a conference of the International Mathematical Society scheduled for September 26 in Havana were denied "licenses" by the Department of Treasury that would have allowed them to spend U.S. currency in Cuba. As a result, they did not attend the conference. We also understand that a decision is pending in the Department of Treasury regarding travel to Cuba by members of the American Association of Engineering Societies for the purpose of attending a conference of the World Federation of Engineering Organizations to begin on October 17.

We believe that these restrictions on travel to Cuba by those wishing to attend an academic conference are compatible with the free circulation of ideas and inconsistent with principles of academic freedom. Since the search for knowledge by researchers, faculty members, and students is indispensable for intellectual creativity, scholars and others wanting to visit a country to attend scholarly or other professional meetings should be unhampered in their foreign travel.

We urge that licenses be granted to those wishing to attend the meeting of the World Federation of Engineering Organizations, and we hope and expect that, as a result of the current inter-agency review of travel restrictions, those wishing to participate in scholarly and professional meetings abroad will no longer require licenses in order to do so.

Sincerely,

LINDA RAY PRATT.

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COMMITTEE OF CONCERNED SCIENTISTS, INC.,
*Bayside, NY, October 5, 1993.*

The Hon. WARREN CHRISTOPHER,
*Secretary of State,*
*U.S. Department of State,*
*Washington,*

DEAR MR. SECRETARY: Our organization dedicated to the protection and advancement of the human rights and academic freedom of scientists is distressed at our Government's blocking American scientists from traveling to Cuba for scientific exchanges. In particular, we are dismayed by the Treasury Department's arbitrary denial of licenses to a group of mathematicians to participate at a conference of the International Mathematical Union, held in Havana September 6–October 1.

Actually this is but the most recent incident of restrictions placed on travel and academic exchange to Cuba and to several other countries. In its letter to you of July 15, the American Civil Liberties Union documented a comprehensive review of such cases. It went on to stress that current restrictive actions violate Congressional mandates barring "indirect restrictions," such as requiring licenses for those applying to attend professional meetings, as a means of regulating trade and monitoring economic embargoes.

We support its position that these indirect measures "effectively ban travel," by most Americans, contravening the constitutional linkage of travel to freedoms of speech, assembly and individual liberty. Moreover, in restricting travel to professional meetings, our Government is also violating its commitments under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Helsinki Accords.

At this juncture when a group of engineers' application is pending for licenses to attend a meeting of the World Federation of engineering Organizations in Havana beginning October 17, we are writing in the hope that you will forestall further interference with freedom of movement and, by extension, the free flow of information.

We applaud your statement to the house Committee on Foreign Affairs of June 7, affirming support for a travel policy that would ensure free "dissemination of information and ideas as a significant element in the promotion of democracy." But we are very troubled by another aspect of your statement, allowing for the possible imposition of limitations for "non-proliferation, anti-terrorism, export control and other highly compelling foreign policy or national security purposes. Such exemptions may be fitting with regard to economic exchanges, in which national security and foreign policy considerations are legitimate. But, as we have witnessed, they have the potential to disrupt freedom of travel and academic exchange.

We therefore respectfully urge you to reconsider your stand and agree that broad exemptions to the free dissemination of information and ideas should not be allowed to intrude in the area of constitutionally protected expression. Aware of the inter-agency review now in progress under your aegis to re-evaluate U.S. travel policy, we look to a report favoring the elimination of *all* restrictions on travel and communication in academic and intellectual pursuits. The implementation of this desired policy would obviate the need for individual licenses to engage in these exchanges and put an end to the arbitrary actions of the Treasury Department, which in effect constitute censorship.

Thanking you for your consideration, we would appreciate your keeping us informed of the progress of the inter-agency task force's review.

Sincerely yours,

PAUL H. PLOTZ,
*Co-chairman.*

JOEL L. LEBOWITZ,
*Co-chairman.*

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COMMITTEE OF CONCERNED SCIENTISTS, INC.,
*Bayside, NY, October 6, 1993.*

Dr. JOHN GIBBONS,
*Director, Office of Science & Technology Policy,*
*Washington, DC.*

DEAR DR. GIBBONS: We are writing to request your intervention in reversing current Treasury Department practice of arbitrarily denying licenses to scientists for participation in conferences and other scientific exchanges. As an organization dedicated to the protection and advancement of the human rights and academic freedom of colleagues both here and abroad, we believe this practice, which effectively bans travel, contravenes the constitutional linkage of travel to freedom of speech, assembly and individual liberty.

While the most recent instance relates to a group of mathematicians who sought to participate in a conference of the International Mathematical Union, held in Havana September 26–October 1, we understand that there have been others involving Cuba and several other countries. Clearly, requiring licenses for academics to take part in professional exchanges violates Congressional mandates barring "indirect restrictions" as a means of regulating trade and monitoring economic embargoes. Moreover, the resultant limitation of travel is in violation of our country's commitments under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Helsinki Accords.

At this juncture when a group of engineers' application is pending for licenses to attend a meeting of the World Federation of Engineering Organizations in Havana beginning October 17, we ask you to recommend positive action by the Treasury Department. This would be a good beginning in forestalling further interference with freedom of movement and, by extension, the free flow of information. The ultimate goal should be elimination of *all* restrictions on travel and communication in academic and intellectual pursuits.

We look forward to your positive response to our request. Thank you for your consideration.

Sincerely yours,

PAUL H. PLOTZ,
*Co-chairman.*

JOEL L. LEBOWITZ,
*Co-chairman.*

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